THE
MADRAS LAW JOURNAL
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OURSELVES

The Madras Law Journal has completed seventy-seven years of law-reporting The Journal has maintained during all this time the goodwill and appreciation of the members of the Bench and the Bar for useful and efficient service rendered The journal will strive to continue to sustain the ideals chalked out by its great founders and the expectations entertained of it by the legal public Law-reporting during this period has undergone remarkable changes both in outlook and approach Originally intended to be a vehicle of information and instruction in legal matters it has come to be a chronicler of authoritative decisions Designed in its infancy to disseminate knowledge of practice points and rulings on procedural problems its concern in later times has been to report mainly decisions on matters of substantive law These tendencies have characterised law-reporting not only in England but in all countries following the system of precedents In India the endeavour to make of the country a Welfare State, the steps taken to transform an agricultural economy into one based on industry, imposition of increasing State control in every department of human activity, the phenomenal output of legislation both at the Central and State levels, these and other factors are throwing up new problems of legal and social significance leaving their impact on litigation and shifting emphasis from the conventional to the specialised fields in the matter of law-reporting At the turn of the century there were hardly more than a journal or two for an area covered by the jurisdiction of a Superior Court Since then law journals have multiplied Journals reporting decisions exclusively in specialised areas like Criminal Law, Company Law, Labour Law, Taxation Law have sprung into existence, and the need has been felt for a referencer of unreported decisions of the Supreme Court as well Again legal practitioners at the present time are not all of them practitioners of law in the traditional sense. Many have either by temperament of for other reasons taken to specialised fields An average lawyer in general practice cannot go in for more than one law journal ordinarily In view of these facts certain broad guide-lines are being followed in selecting cases for publication in this Journal. Decisions of the High Court on general law and State Law and legislation, and decisions of the Supreme Court on appeals from the Madras High Court are given the highest priority Such decisions of the Supreme Court in appeals coming up from other High Courts as are likely to be particularly

useful to legal practitioners in the city as well as in mofussil areas are also included. Decisions in specialised fields are not ordinarily included at the expense of decisions on general or State Law and legislation since there are Journals confined to reporting such cases exclusively They get reported in this Journal only where it is felt that they have an importance transcending the particular context in which they are given The selection of cases is done objectively and dispassionately though there are always bound to be differences of opinion on account of individual predilections of legal practitioners and their own special requirements. Statistics may not be everything in this respect but it may be of some use in understanding how the guide lines are being implemented and how the reporting of decision on State Law and legislation and matters of interest to the Bar as a whole has not suffered The figures for the years 1965 and 1966 are as follows

Volume and year	*No of cases reported in all*	*No of Income-tax cases reported.*	*No of Labour law cases reported*	*No. of Supreme Court decisions reported*	*No of pages in High Court Reports*	*No of pages in Supreme Court Reports*
(1965) 1 M L J	177	20	8	22	617	149
(1965) 2 M L J	191	8	7	31	568	176
(1966) 1 M.L.J.	171	20	Nil	23	562	172
(1966) 2 M.L J	153	10	1	20	582	100

Constructive suggestions from Readers of this Journal will always be appreciated.

"CONCEALMENT OF DISEASE"—WHETHER A GROUND FOR A DECREE OF NULLITY

By

Dr Sushil Tewari, *M A , LL M (Lond), Ph D (Lond)*

The "fraud" which will suffice to entitle the petitioner for a decree of nullity has been defined[1], "as a deliberate act of deception and/or dishonesty including a concealment or misrepresentation of an existing material fact or facts in any way relating to the essence of the marriage, and actually inducing that marriage." The question is, in view of *Anath Nath* v *Lajjabati*[2], whether concealment of a disease is fraud sufficient to warrant a decree of nullity It is submitted that a concealment of an incurable disease, including hereditary insanity, affecting the health and well-being of the spouses and their off-spring, is fraud sufficient to warrant a decree of nullity The proposition finds support from Indian as well as American cases

In *Birendra Kumar* v *Hemlata Biswas*[3], the petitioner, *B*, asked that his marriage with the respondent, *H*, may be declared null and void, on the ground that the respondent had been suffering from a loathsome disease of syphilitic origin alleged to be incurable and the petitioner alleged that the marriage was brought about fraudulently and that all the information with regard to the disease was concealed from him Mookerjee, A C J , remanding the case for further investigation of the alleged fraud, observed that[3], "Concealment of loathsome and incurable form of syphilis is recognised as fraud sufficient to warrant divorce or annulment." On remand[3], the case was heard by Greaves, J , who found upon the evidence that the father of the respondent knew prior to the marriage that the respondent was suffering from syphilis, and that this fact was not known to the petitioner but was concealed from him The learned judge, assuming that the father knew that the disease was incurable, did not think[3] "that this would be a good ground for annulling the marriage"

It is submitted that the observations of Mookerjee, A. C J., were a correct exposition of law because a person afflicted with a grievous incurable and contagious disease is a source of hidden danger and when a marriage is performed concealing such a disease the diseased spouse threatens the other spouse with infection and their children with hereditary disease. In such circumstances, on the considerations of public policy, a case exists for interference by way of judicial annulment

A recent case on the question is *Ananth Nath* v. *Lajjabati*[4], where it was alleged that the consent of the petitioner was obtained by fraudulent representation as to the respondent's health. It was represented that the respondent was of sound health whereas in fact she was suffering from tuberculosis The Court held that concealment of a disease does not avoid a marriage. In this case the decision is

1. Tewari Sushil, "*Nullity of Marriage in Modern Hindu Law*", an unpublished Thesis, University of London (1965), p 292
2 A I.R 1959 Cal 778
3. A I R. 1921 Cal 459, 464 and 465
4 A.I R. 1959 Cal. 778 See as to the comments on the case, J.D M. Derrett · (1964) *Revue du sub-est asi atique* at p. 239.

right because the disease was curable but it is submitted that the Court took a narrow view on the subject when it observed that[1] "....concealment of a disease other than those mentioned in the said section (section 13 (*iii*) (*iv*) HMA) cannot be the foundation for avoiding the marriage", because it failed to consider the effect of a distinction between a curable and incurable disease, a disease going to the "root" of the marriage, such as syphilis and a disease which does not directly relate to the purposes of marriage.

In American cases a fraudulent concealment of tuberculosis, hereditary insanity and venereal disease has been generally held to be a ground for nullity on the ground of fraud. In *Bernice Leventhal* v *Fennie Liberman*[2], the marriage was annulled because of the husband's and his parent's fraud in procuring the consent of the wife to the marriage The father and the sister of the respondent were both specifically asked, before the marriage, regarding the health of the young man. They both assured the plaintiff and her family that the respondent had never been sick, whereas, in fact, they both knew that he was tubercular and had been treated for the disease In *Davis* v *Davis*[3], and *Sobol* v *Sobol*[4], the Court gave a decree of nullity to the wife, where the husband was suffering from tuberculosis, emphasizing dangers to the health of the wife and her offspring We find, as to the concealment of venereal disease, that generally if either spouse conceals from the other that he or she is afflicted with an incurable chronic venereal disease, it is deemed to be such a fraud as will warrant a decree of nullity[5].

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1. *Anathnath* v. *Lajjabati Devi*, A.I R 1959 Cal. 778 at 780.
2. (1933) 88 A L R 782.
3. (1919) 106 A 644.
4. (1914) 150 NYS. 248.
5. *C. v. C.*, (1914) 5 A.L.R. 1013 and cases referred to therein.

SRI T. M. KRISHNASWAMI AIYAR B.A., B.L.

THE LATE SRI T. M. KRISHNASWAMI AIYAR.

The New Year has opened on a sad note for the members of the legal profession. Sri T. M. Krishnaswami Aiyar who was a member of the Bar for the last six decades is now no more with us. Among the galaxy of legal practitioners who had made a mark in the profession and enjoyed a lucrative practice in the pre-Independence era, the late Sri T. M. Krishnaswami Aiyar held an honoured place. Along with Sir Alladi Krishnaswami Aiyar and Sri K. V. Krishnaswami Aiyar he formed the third of the trio to whom Justice Odgers always referred to with pride and affection as "my three Krishnaswamis". Born at Tiruvayyar in the Tanjore District in 1885, Sri T. M. Krishnaswami Aiyar joined the Bar in 1907 and practised before the High Court (except for a period of four years, 1943 to 1947, when he was Chief Justice of the Travancore High Court) with signal success till 1963 when he gave up active practice. As a lawyer he was imperturbable, patient, and tenacious in his advocacy. He presented his cases calmly without flourishes and with fairness and ability. His preparation was thorough and his knowledge of legal principles sound. He was a very popular member of the Bar exuding affability and good humour. It was a pleasure to his juniors in the case to instruct him, for he was always receptive to their view-points, generous in his appreciation of good work and tolerant of their mistakes. A genial smile, a kindly word, or a pleasant nod he would extend to every junior member putting him thoroughly at ease with the result that he earned the respect and affection of one and all of them. It was no surprise that he served as the President of the Advocates Association for three terms and was elected as a member of the Bar Council for four terms. He was on the Editorial Board of the Indian Law Reports (Madras series) for some time and of the Madras Law Journal for about three decades. He was connected with several public organisations and institutions and as a co-opted member of the P. S. Charities Trust Board he rendered yeoman service for a number of years.

Well-known as he was as a great lawyer he was equally well-known as an ardent devotee of Lord Muruga and as a godly man. Round about 1922 he came under the influence of Vallimalai Swamigal and became a deep-rooted bakta spending all his time except when attending Court in the singing of Thiruppugazh bhajans. Endowed with a voice suited for the purpose and musical talents his bhajans at various places like Vadapalani, Tiruttani, etc., drew wide attention and came in for high appreciation. His Holiness the Sankaracharya of the Kamakoti Peetam conferred on him the title of "Thiruppugazh Mani" in 1928 and in 1955 Swami Sivananda of Rishikesh honoured him with the title of "Thiruppugazh Johti".

His association with the Madras Law Journal was highly valuable. It could count always on his wise guidance and sapient counsel in addition to his constant encouragement. Sri Krishnaswami Aiyar was a great lawyer and a great gentleman in the true sense of the term. Such men as he are rarely found. His death creates a void which cannot be easily filled. We offer our sincere condolences to the members of his family on the bereavement they have suffered.

THE LAW, THE JUDICIARY AND THE RULE OF LAW.*

By

T V VISWANATHA AIYAR, B A., B L, *Senior Advocate.*

The scope of this Colloquium is to consider the practical steps to be taken to combat our National ills and to create a climate for national uplift and integration on the basis of ethical and spiritual values. I shall therefore deal with the subject allotted to me—"The Law, the Judiciary and the Rule of Law"—in this background.

The Law seeks to bring about harmony and good fellowship based on Justice in accordance with moral and spiritual sense of the community In the modern State "Law" takes in the entire body of principles in accordance with which justice is administered by the State The objectives, the form and even the techniques form part of it.

Before proceeding further, let me for a moment consider the Indian background and tradition and what has been native to the soil all through the millenia since the age of the Vedas

The Atharva Veda says

Satyam brihad ritam ugram diksha tapo
brahma yajnah prithivim dharayanti (Ath XII 1.1)

(Truth, eternal order that is great and stern, consecration, austerity, prayer and ritual—these uphold the earth) **Satya** (truth) and **Rita** (eternal order, discipline of eternal law) are two basic terms of ethical value used in the Vedas. **Rita** was originally the order of natural events such as the orderly appearance of the sun, moon and the stars, the succession of seasons or the harvest of crops. But soon it came to mean not only the cosmic order but also the moral order and co-ordination between natural law and moral law The gods were extolled as the guardians of both especially **Varuna** as the god of righteousness

The Mahabharata giving the root meaning of **Dharma,** says
Because it upholds, it is called Dharma,
Dharma upholds the creation.

The Buddha used the word **Dhamma** signifying thereby the eternal moral principles, unconnected with the presence or absence of one's faith in the Divinity.

God is **Dharman** the upholder of eternal statutes. The conception of God includes the principle of eternal law, moral and cosmic or **Rita,** eternal order. According to the Vedas, God is God because He upholds the eternal law and is not an arbitrary dictator doing good or evil according to His whim or wish. "Gods chant the song of Rita" says the Veda As, on the moral plane, Rita leads to the triumph of good over evil, so on the cosmic plane it leads to the triumph of light over darkness.

There was nothing higher than organised principle or sacred order. All were subject to the Rule of Law. The Brahadaranyaka proudly proclaims "Law is the King of Kings far more powerful and rigid than they. Nothing can be mightier than law by whose aid as that of the highest monarch even the weak may prevail over the strong". Legal order or human society was to be in line or tune with the

* Paper for All India Colloquim on Ethical and Spiritual Values as the basis of National Integration—Bharathiya Vidya Bhavan, Bombay. (30th December, 1966—2nd January, 1967).

Universal or cosmic order and in harmony with it. Vedic **Rita** was the reigning principle of the universe and also the divine ordering of earthly life.

Let us now turn to a recent declaration made thousands of years later. It will be seen that the emphasis is more on rights rather than on duties. The General Assembly of the United Nations adopted, on 10th December, 1948, the Universal Declaration of Human Rights and affirmed in clear terms that the foundation of freedom, justice and peace in the world was the recognition of the inherent dignity and equal rights of the members of the human family. It proclaimed in no uncertain terms the advent of an era in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.

The Declaration considers it vital that Human Rights should be protected by the Rule of Law if recourse is not to be had to rebellion, tyranny and oppression. The Rule of Law embraces within itself as an integral part, not only the recognition and effective protection of the civil and political rights of the individual in a free society but also the establishment of social, economic, educational and cultural conditions under which he can attain his full dignity and legitimate aspirations. So, the imperative need for an active recognition and implementation of Human Rights and the Rule of Law at every turn and everywhere, all over the world. The need for this is so well recognised that the Economic and Social Council of the United Nations has at its 39th session, set out a programme for celebrating the year 1968 as the International year of Human Rights. The dignity of the human person is a universal concept regardless of the different forms it may assume in one or another cultural environment.

The Rule of Law is conceived as a dynamic concept to safeguard and advance the civil and political rights of the individual in free society. It helps to encourage "the spread of humanism in law, based on the respect for human dignity in the context of social and economic justice". The Rule of Law is of universal validity and application as it embraces those institutions and principles of justice which are considered minimal to the assurance of human rights and the dignity of man.

The conclusion of the Second Committee of the International Congress of Jurists, New Delhi, 1959 has admirably stated the position thus

"The Rule of Law depends not only on the provisions of the adequate safeguards against abuse of power of the Executive, but also on the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society."

"The following propositions relating to the Executive and the Rule of Law are accordingly formulated on the basis of certain conditions which are either satisfied, or in the case of newly independent countries still struggling with difficult economic and social problems are in the process of being satisfied. These conditions require the existence of an Executive vested with sufficient power and resources to discharge its functions with efficiency and integrity. They require the existence of a Legislature elected by democratic process, and not subject either in the manner of its election or otherwise, to manipulation of the Executive. They require the existence of an independent Judiciary which will discharge its duties fearlessly They finally call for the earnest endeavour of the Government to achieve such social and economic conditions within a society as will ensure a reasonable standard of economic security, social welfare and education for the mass of the people".

The Charter of Human Rights framed by the United Nations—has only given content and shape to natural rights which human dignity and personality demand and deserve All these rights will have meaning and content only to the extent they are put in practice by the component member States of the World Organisation. They cannot be left as mere pious wishes and pieces of paper, well printed, framed and exhibited.

Our Constitution, as many others, has codified these natural or human rights and called them, Fundamental Rights. These are rights the people have recog-

nised and given themselves by the Constitution and are capable of enforcement in the manner prescribed.

The Preamble to the Constitution gives succinctly the scope and purpose, our ideals and aspirations to constitute India into a Sovereign Democratic Republic and to secure to all its citizens JUSTICE, LIBERTY, EQUALITY AND FRATERNITY. The Constitution has aimed at a Welfare State and preserved the people's natural rights against State encroachment or misuse and also made the Judiciary the sentinels and guardians of those rights. No one is to be denied the opportunity or the means to develop himself on the lines he plans subject only to the limitations or controls prescribed in the interests of the State and society.

The fundamental rights enshrined in our Constitution are (i) Right to equality (Articles 14 to 18), (ii) Right to freedom (Articles 19 to 22), (iii) Right against exploitation (Articles 23 and 24), (iv) Right to freedom of Religion (Articles 25 to 28), (v) Cultural and educational Rights (Articles 29 to 30), (vi) Right to property (Article 31) and (vii) Right to constitutional remedies (Article 32). When the Constitution came into force in January, 1950, there was unanimous praise for these rights for they were comprehensive in language and clear in purpose and stood out as beacon lights to the people. All laws in force till the 26th January, 1950 to the extent of their inconsistency with the fundamental rights were declared void The State was also enjoined not to make any law which took away or abridged the fundamental rights The only permitted limitation on the said rights was a valid law made and operating as a reasonable restriction in the interests of public Both the conditions, whether there was inconsistency with the Constitution and whether the restrictions were reasonable were made justiciable issues on which the opinion of the Courts was decisive. Thus the people who gave themselves the Constitution provided at the same time judicial protection to their cherished rights.

But within seventeen years of the Constitution we have had a spate of amendments, more than once a year in the average, which have sought to nullify the pronouncements of the highest Courts in the land declaring numerous Laws enacted by the Legislature and several acts of the Executive Governments unconstitutional and therefore, void. The sanctity of the Constitution has been interfered with rather too lightly by the very persons and institutions who should be the first to obey it, *viz.*, the Legislatures and the Executive Government Instead of setting a good example by showing their absolute loyalty to the Constitution, taking all care not to violate it, the party in power and the Legislatures concerned have lost no time in taking immediate steps to amend the Constitution as if it is ordinary municipal law subject to yearly or half yearly doses of amendments and even repeals. Instead of the laws being made subservient to the Constitution, the situation has become the reverse and the Constitution is made to serve party objectives and policies. If Fundamental Rights are to be interfered with in this haphazard way and so lightly and with such unseemly haste, it is bound to make a mockery of Constitutional rights Besides, it will set a bad example for future Governments which may follow and embolden such Governments to make greater and greater inroads into well established democratic principles and ways of life. Having regard to what has happened during the last sixteen years it would appear that amendments to the Constitution have been too readily made with an eye on the ballot box rather than due to any inherent defect or deficiency in the principles adumbrated in the relevant articles of the Constitution as originally framed. India would appear to be the only Democracy in which a Preventive Detention Act is in full operation and continuously even during peace time. The absence of a strong opposition to prevent the Government from going headlong with their group majority is one of the greatest deficiencies we are suffering from. Democracy can truly work only when there is a fairly well matched party system at work.

Furthermore it is only in the measure there is reverential attachment to the Constitution by all concerned that there can be any effective safeguard and guaran-

tee against the infringements of the rights which the people have preserved for themselves under the Constitution.

The Constitution has promised to usher in a Welfare State and naturally therefore the Government has occasion to create innumerable administrative tribunals—judicial and quasi judicial—with power to sit in judgment on and interfere with every sphere of human activity Inevitably, therefore, there are bound to be innumerable cases of abuse or alleged abuse of their powers The Supreme Court and the High Courts have been vested under Articles 32, 226, etc, with the power of correction and supervision This power of Judicial review has been a great bulwark against excessive and arbitrary use of executive power.

It is in this setting that the importance of a strong and independent Judiciary not beholden to the Executive for their selection, appointment or preferment, becomes very significant and crucial Many a Bar Association and several of the leading members of the Bar and the public have raised their voice against the Executive Government having a say in the selection of High Court Judges and particularly in the appointment of Additional Judges We have had rumbles of these and other defects too often Unless the Judiciary is strong and independent and boldly performs its functions to prevent any encroachments either by the Legislature or by the Executive, the rights given under the Constitution, even if they be comprehensively and well expressed, would only be in the nature of a paper protection This does not mean there should be any competition or antagonism. Each branch or leg is supreme in its allotted sphere

The Judiciary, the Legislature and the Executive form, as it were, the three legs of a tripod and it is only by all the three legs standing firmly and together there could be stability and balance as a whole The basic requirement therefore is that all the three should loyally and firmly believe in the sanctity of the Constitution and the Rule of Law None of the three can exceed its sphere and encroach on the rights of the other two It is only to the extent these three branches work together harmoniously and with understanding there could be scope for genuine progress and good Government in the country and a place in the counsels of the world

Not only should there be no conflict between the three branches, it is equally incumbent that the persons who man them should be persons of courage and character to act boldly and without fear or favour The excellence of any operation depends not only on the tools employed but also on the efficiency and capacity of the operator and the environment he works in.

The Rule of Law and the maintenance of the fundamental principles of justice and the rights enshrined in the Constitution therefore depend upon an adequate and lively recognition of the fact that, (1) a mere declaration of a Bill of Rights is no guarantee or protection against its being interfered with, (2) the citizen as well as the State (in all its three branches) are subject to Rule of Law, (3) loyalty to the Constitution and the Nation is the first duty of all concerned, (4) the Judiciary should be guided by the Rule of Law and steadfastly and readily protect and enforce it without fear or favour and resist all encroachments on their independence, (5) the public, especially the members of the Bar, the Press, the elite and the makers and repositories of public opinion, should be ever ready, vigilant and strong to assert the Rule of Law and the rights of the individual, or other person affected.

The Constitution is the great Charter to which all laws must conform No law in the statute book can be valid unless it is consistent with the fundamental rights as crystallized and embodied in the Constitution These fundamental rights cannot be taken away or abridged They are enacted in national and public interest to preserve to the people their rights. There cannot therefore be any waiver there

of. Can they however be abridged or taken away by legislative action by Parliament, i.e., by amending the Constitution? Two decisions of the Supreme Court have said 'yes' Since the correctness of these decisions has been seriously questioned, the Supreme Court has recently (in full Court) further considered the whole question. The judgment is awaited with great interest as any reversal of the former view will have a far-reaching and momentous effect. Then again the Constitution itself has provided in Article 358 for the suspension of the provisions of Article 19 during emergencies and in Article 359 suspension similarly of the enforcement during emergencies of the rights conferred by Part III of the Constitution.

Let us now turn and have a look at the present situation in the country It is a sad spectacle—narrow, regional, parochial, communal, language, group and personal considerations have come to the forefront the agitational approach has entered almost every sphere of activity and what is worse, yielding dividends Violence and unrest are in the very air we breathe Prices are soaring and there is widespread discontent and fear of economic in security Quarrels between State and State, region and region, Government and its servants, employers and employees are the order of the day, not to speak of sabotage, serious destruction of Railway properties, strikes, bundhs and the like. The public are put to loss and untold suffering The Government and the guardians of the Law appear to be looking on helplessly Even the very precincts of Parliament, and portals of Government are not safe What is happening inside the Legislature and Parliament is no better How can there be in them any fruitful discussion, deliberation, debate or consideration of anything on its true merit? Nepotism and corruption seem to go unchecked **Asathya** and **Adharma** are on the increase and the erosion of moral values has been a continuous process The General Elections are around the corner and there is going to be further erosion Unless therefore we take stock of the situation in time and take steps to stop these tendencies, there is bound to be social chaos and political disorder. Is it not high time we do so?

It is the primary duty of any temporal Government to uphold the Law The pre-condition of a good society is a stable and efficient Government protecting the innocent and punishing the guilty It is only firm rule, purity in administration and timely action that can restrain violence and anti-social activities and put down lawlessness Raja-niti and Danda-niti go together No State can afford to abjure legitimate action and punishment Its function is to govern and that with firmness, fairness and justice Supineness, inefficiency and neglect of duty are as bad as excessiveness, harshness and arbitrariness What sustains society is not the existence of law or the law-giver It is the pursuit of Dharma which alone can bring us nearer to our goal of peace, progress and good Government.

It is true India is a Secular State But that does not mean that in its name all moral, ethical and spiritual needs have to be neglected Furthermore, there has been too much attention paid to rights without an adequate insistence on duties to ourselves, to the community at large and to the Nation itself. The Dharma of our ancients is much wider in scope and much more purposeful than the modern concept of the Rule of law Dharma is the binding force which holds society together It pertains to the whole duty of man in the scheme of life. It is right action The primary duty of Dharma is that it should subserve a spiritual purpose and that it should enable every one to discipline himself and become a more perfect human being and member of Society Sri Rama is worshipped because he was the embodiment of Dharma—**Ramo Vigrahavan Dharmaha.** The dictum **dharmo rakshati rakshitah**—dharma protects its protector—is as valid today as ever before. What is imperative is for each of us to restrict our physical and material needs and external aid to the barest minimum and cultivate to the maximum self reliance and self help, and strive earnestly to be good and to do good

BOOK REVIEW.

FIELD'S LAW OF EVIDENCE 9th Edition in four volumes Revised by *Sri T L Venkatarama Aiyar, Sri R B Seth* and *Sri R Venkataramaiah* and published by Law Publishers, Allahabad Volume I, 1964 and Volume II, 1965 Price Rs 20 per volume

Field's Law of Evidence was the first commentary on the Evidence Act and became a classic long ago More than 35 years separate the present edition from the previous one and the task of revision and editing had certainly become fairly formidable. The task has however been accomplished by the collaboration of three eminent legal luminaries spearheaded by Sri T L Venkatarama Aiyar. The first volume covers sections 1 to 14, and the second sections 15 to 31 of the Evidence Act. A merit of the work is that each volume carries its own index The preface to the present edition states that it is proposed in the fourth volume " to have a supplementary chapter discussing questions pertaining to the law of evidence in relation to the provisions of the Constitution and other important questions ", though the exact import of the words " other important questions " is not clear The commentaries would not have suffered by pruning at some places Whether the matter contained for instance in pages 37 to 50 should have found a place in that form is debatable In spite of a fairly satisfactory analysis of the case law, some recent decisions which one would expect to have been noticed do not seem to have been touched Thus the decision of the Supreme Court in *Shashi Kumar Banerji* v *Subodh Kumar Banerji*, A I R 1954 S C 529 dealing with the appreciation of the evidence of a chance witness, and that in *Baleshwar Rai* v *State of Bihar*, (1963) 2 S C J 128, I L R 42 Pat 166, holding that an admission regarding motive in committing the murder of the deceased is admissible under section 21 of the Evidence Act are not to be found though it may be that they have been mentioned elsewhere The commentaries are lucid and helpful and the presentation is analytical The remaining two volumes will be awaited with great interest by members of the Bar as well as the Bench.

THE IDENTIFICATION OF HANDWRITING AND THE CROSS-EXAMINATION OF EXPERTS. By *M K Mehta* Published by N M Tripathi & Co. Bombay-2. Third Edition, 1966, pages 366. Price Rs 21.

Long ago, Dr Lawson observed in his book " Law of Expert and Opinion Evidence " : " The evidence on handwriting identification is so weak and decrepit as scarcely to deserve a place in our jurisprudence ". The author claims that though the science of identification of handwriting has not reached such perfection as the science of mathematics or fingerprints yet it has progressed since then to such an extent that a correct conclusion could be reached in every handwriting problem provided a thorough analysis of all the writing habits and personal characteristics is made (page 19) In fact, according to the author, it has developed to such an extent that it can be safely asserted that it is an exact science (p 1). The author's exposition is built on the twin principles underlying examination of handwriting, which are, that nature never duplicates and no two persons write exactly alike, and again that no habit can be cast off easily and a person cannot abandon or discard abruptly or at will his internal writing habits The author's thesis is that the handwriting of each individual carries its own special and distinctive characteristics and so attempts at subterfuge are bound to fail under the critical gaze of a trained expert The question of genuineness of documents and handwriting frequently comes up before the law Courts Section 45 of the Evidence Act makes expert evidence admissible in regard to the question Who is an expert is however not a matter which admits of a satisfactory answer The author recognises that for lack of a professional training course on the subject many of those posing as experts are or may be really charlatans at the game. This has been responsible for conflicting opinions being given and the consequent failure of such testimony to find acceptance. The author refers to the large number of judicial dicta on the matter. Mr. Mehta

has dealt with the subject in an interesting manner and has endeavoured to explain all the characteristics of handwriting in a simple and lucid way by providing copious illustrations from the cases where handwriting had been disputed before the Courts of Law Mr Mehta makes a plea for admission of expert testimony on type-scripts also inasmuch as the science of identification of type-scripts is as definite now as that of thumb impressions, and he suggests suitable amendment to be made in the Evidence Act to include this subject under the definition of science The book represents a significant and helpful contribution to the literature on questioned documents

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GELDART'S ELEMENTS OF ENGLISH LAW 7th Edition by *D C M Yardley* Published by the Oxford University Press, London (Oxford Paperbacks University Series), 1966 7/6 net

During the fifty-five years since the publication of the first edition English law has undergone great changes in many directions, some of them almost revolutionary. Profound developments have resulted through Parliamentary legislation like the Fatal Accidents Act, 1959, the Corporate Bodies Contrate Act, 1960, the Obscene Publications Acts of 1954 and 1964, the Suicide Act, 1961, the Carriage by Air Act, 1961, the Contracts of Employment Act, 1963, Children and Young Persons Act, 1963, the Public Order Act, 1963, the Matrimonial Causes Acts of 1963 and 1965, the Limitation Act, 1963, the Married Women's Property Act, 1964, the Resales Prices Act, 1964, the Trade Disputes Act, 1965, the Race Relations Act, 1965, the Murder (Abolition of Death Penalty) Act, 1965 etc All such developments have been taken due note of and the revised text gives an exposition of modern English law still in its historical setting The law is dealt with under eight titles (i) Statute law and Common law, (ii) Common law and Equity, (iii) Probate, Divorce and Admiralty, (iv) Persons and Personal relations, (v) Property, (vi) Contracts, (vii) Torts, and (viii) Crimes Students of Domestic Relations will note with particular interest that under the Marriage Act, 1949 marriage of persons either of whom is under 16 years of age is void ; that under an Act of 1926 an adopted child passes completely into the new household with its ties in the natural family wholly extinguished, and that it comes under the same liabilities as a natural child to maintain the adoptive parents, and that by the Adoption Act of 1958 property of the adopter and the adoptee is to devolve in all respects as if the adoptee were the child of the adopter born in lawful wedlock, that under the Guardianship of Infants Act, 1925, both parents are equally entitled to the care and custody of the infant, and in case of a dispute between them the Court looks to the welfare of the infant only, that under the National Assistance Act, 1948 a man is liable to maintain his wife and children and a woman is liable to maintain her husband and children The book constitutes a helpful and authoritative introduction to the study of English law and should find a place in every Library.

REFORMS NEEDED IN INDIAN INCOME-TAX LAW by *V R Dalal* Published by the Forum of Free Enterprise, Shorab House, 235, Dr D N Road, Bombay-1

Lord Macnaghten's statement that income-tax is an immoral tax has ceased to be accepted as valid and income-tax has come to stay The law pertaining to it as found in the Income-tax Act is complicated, confusing and even contradictory In this booklet of 20 pages the author seeks to bring out the various defects besetting the Income-tax Act of 1961 both in the matter of drafting as well in regard to its contents Thus one of the points made is that while section 185 provides for the registration of a firm if the Income-tax Officer is satisfied about its genuineness and constitution, section 183 (*b*) curiously enough empowers the Officer to treat an unregistered firm as a registered firm if in his opinion the aggregate amount of tax payable by the partners treating the firm as registered is larger than the tax that would be payable by the unregistered firm The points made by the author are bound to be of interest to the taxing authorities as well as the taxpayers.

THE POWERS OF GUARDIANS OF NON-MUSLIM MINORS: A SAD MISUNDERSTANDING

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The publication of the judgment of a single judge (L M Paranjpe, J) of the Bombay High Court in **Vijayakumar** v **Gokulchand**[1], reopens the question whether a Privy Council decision of 1911 had or had not been impliedly overruled by a Privy Council decision of 1948 This old controversy was embarrassing, since many Indian decisions had been founded upon the earlier case, and when the second was decided not a few of these turned out to be wrong The controversy existed because in the later judgment, **Subrahmanyam** v **Subba Rao**[2], no reference whatever was made to the earlier, **Mir Sarwarjan** v **Fakhruddin Mahomed Chowdhuri.**[3] The latter case (1911) is referred to in all the books, including those dealing specially with transfer of property and specific relief. Its limitations have hardly ever been correctly observed.

The conflict, or rather apparent conflict, between these two Privy Council cases was thrashed out on a grand scale in two Full Bench cases That in Madras, **N. B. Sitarama Rao** v **Venkatarama Reddiar**[4], insisted finally that **Mir Sarwarjan**[3], which we can call the Muslim case, was correctly decided and had not been interfered with in any way by **Subrahmanyam's case**[2] That in Andhra Pradesh **Vadakattu Suryaprakasam** v. **Akka Gangaraju**[5], held that the Privy Council must be deemed to have overruled the Muslim case when it decided, so many years later, the Hindu case Which of these points of view was right ?

The ultimate questions of law are not greatly affected, since the correctness of **Subrahmanyam's case**[2] is nowhere doubted Their Lordships there said[6], quoting from Pollock and Mulla's **Indian Contract Act** and **Specific Relief Act,** seventh edition, p 70

" the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his own behalf so as to bind him by it, and, further, it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all."

And they themselves proceed to say,

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1. (1964) 68 Bom L R. 891 The fact that *Mir Sarwarjan's case* dealt with Muslims is noticed at p 894 (top) but the full force of this evidently did not strike the learned Judge
2 L R 75 I A. 115 I L R (1949) Mad 141 : (1948) 2 M.L J 22 A I R 1948 P C. 95
3 (1911) L R 39 I A 1 14 Bom L R. 5 . I L R 39 Cal. 232 21 M L J 1156 (P C)
4. I L R (1956) 7 Mad 99 (1956) 1 M L J 5 A I R 1956 Mad. 261 (F B)
5 (1955) An.W.R 818 : A.I.R. 1956 Andh. 33 (F.B).
6. I L R (1949) Mad. 141 at p. 147 · L.R. 75 I.A 115 : (1948) 2 M L.J 22.

"In the present case neither of the two conditions mentioned is wanting, having regard to the findings in the Courts in India It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the (minor) respondent, and not his mother, was the owner If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother."

These words could not have been uttered if the minor could not have been bound by an agreement to sell properties formerly belonging to the coparcenary of which he, a minor, was the sole surviving member. If the minor were not competent to transfer through his mother as guardian, the decision could not have been arrived at, and indeed, the decision was to the effect that the minor was bound by the agreement (which had been partly performed) under section 53-A of the Transfer of Property Act

All the cases which now rank as authorities take the same view. In **N. B. Sitarama Rao v Venkatarama Reddiar**[7], it is held that "contracts entered into on behalf of a minor by his guardian or manager of his estate can be specifically enforced by or against the minor, if the contract is one which is within the competence of the guardian or manager who had entered into it on behalf of the minor, so as to bind him by it, and if it is also for the benefit of the minor. This presupposes specific performance of a contract against the minor also." In **Vadakattu Suryaprakasam v. Akka Gangaraju**[8], it was held that the contract entered into by the guardian was specifically enforceable against the minor. But the Court's discretionary powers in applying the equitable remedies were saved. In **Vijayakumar v Gokulchand**[9], it is repeated that a contract (for purchase of valuable property) entered into on behalf of a Hindu minor by his natural guardian will be enforceable if the guardian was competent to enter into it and if it was for the benefit of the minor

Yet their Lordships of the Privy Council, through the mouth of Lord Macnaghten, had said in **Mir Sarwarjan's case**[10]:

"They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

It is not a case where **dormitat Homerus,** as Viswanatha Sastri, J., suggested in **Ramalingam Reddi v Babanambal Ammal**[11], for in

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7 I L R (1956) Mad 99 (1956) 1 M.L J 5 A I R 1956 Mad 261 (F B)
8. (1955) An W.R 818 A I R 1956 Andh 33 (F B).
9. (1964) 68 Bom.L R. 891
10. (1911) L.R. 39 I A. 1, 6 . I.L.R. 39 Cal 232, 237 : 14 Bom.L.R 5 : 21 M L J 1156.
11. (1950) 2 M.L.J. 597.

fact what Lord Macnaghten said was perfectly correct. The reason for it is so simple that one wonders how the mistake could have been made of supposing that, though the minor would be bound where his guardian was competent, a guardian could not generally be competent to buy immovable property with the minor's money, and thus specific performance of an agreement to buy immovables must be refused against a minor.

If, as the learned Bombay judge opines[12], the Madras Full Bench was in error in reconciling the two Privy Council decisions in an ingenious manner, very probably the Andhra Full Bench is equally in error in supposing that, so far from reconciling the two Privy Council cases, we must consider the earlier overruled by the latter. Persuasive as the latter judgment is, it is unnecessary to suppose an overruling. The Madras Full Bench attempted to reconcile the two by supposing that the Muslim case was confined to purchases of property, whereas the latter case dealt with agreements to **sell** (in which the question of the benefit of the minor might loom large), at 119 in the I L R report a further distinction is suggested, namely that the doctrine applied only to separate property, but the previous was the main point of attempted distinction It was precisely in relation to a purchase that the Muslim case of 1911 was relied upon recently in favour of a minor who wished to evade his guardian's undertakings· but without success as our Bombay case shows. However, the question is quite capable of cropping up again and an attempt to re-distinguish the Muslim case will arise sooner or later in the Supreme Court.

The purpose of this note is to explain what must have happened and thus indicate what the law is The facts and the earlier stage in the litigation are plain from **Mir Sarwarjan** v **Fakharuddin Mahomed Chowdhury** in the Calcutta High Court [13] The attention of everyone concerned was concentrated on the question whether, if a minor's acts are void, as had been recently held, his manager's acts could bind him as effectually as they might bind the opposite party to the transfer, so as to provide a mutuality of enforceability, in order that either party might have specific performance against the other The cryptic answer of the Full Bench, that "if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract it might be specifically enforced", shows to what the learned judges applied their minds. The question whether the contract was validly entered into was never thrashed out properly in Calcutta.

When the matter went to the Privy Council the latter Court did what it has often done supremely well. It sorted out the tangled threads of the Indian litigation Far too often in India the facts and issues tend to become involved, and the vital clue to the rights of the parties is buried beneath irrelevances and trivial, a state of affairs for which the parties themselves are often chiefly to blame. When the matters came to the Privy Council fresh minds cut through the verbiage and tortuousnesses of the cases, and simple considerations quickly disposed of litigation which had exhausted parties and their advocates for decades Ours was just such a case. In **Mir Sarwarjan**, our **'Muslim case'**[14], the inadequacies of the Full

12 (1964) 68 Bom L.R 891, 895

13. I L R (1906) 34 Cal 163 (F B)

14. (1911) 39 I A. 1 14 Bom L.R. 5 : I.L.R 39 Cal. 232 · 21 M.L J 1156 (P C)

Bench answer were noticed by the Privy Council. The real question was seen to be whether the manager had power to do as he did If he had the power he might in fact be entitled to bind the minor. If he did not have the power those subtle questions of mutuality might be disposed of.

By what law should they decide the guardian's or manager's powers? These could not be decided by reference to mutuality or any such further question. First things first The minor was a Muslim. The other party to the transaction was a Muslim. The fact that the manager in whose hands the business lay was a non-Muslim was neither here nor there, though it was common ground that he was not a legal, nor an appointed guardian, but only some kind of manager The law determining the powers of a guardian, and therefore **a fortiorari** of a manager, was the Muhammadan law. At Muhammadan law (as Baillie's **Digest** shows most clearly) no one placed as that gentleman was had power to purchase any property except in the plainest necessity, and no one had any power to purchase immovable property with the minor's money. The Muhammadan law relating to the powers of a guardian is fairly widely, and authoritatively, dealt with by Mr. Ameer Ali in **Imambandi** v **Mutsaddi** seven years after our Muslim case [15] But the materials relied upon are the old materials, Baillie's **Digest** and Hamilton's **Hedaya,** which of course had been in use for years The minor was not bound because the act was void under his personal law As the act did not bind **him** the agreement lacked mutuality and specific performance could not be decreed against either party It is not the case that that agreement failed to have the desired effect because of want of mutuality, as so many readers have (not unnaturally) supposed, but it failed to bind the minor because of his personal law In argument De Gruyther, K C and Kenworthy Brown said that the agreement was not enforceable by or against the minor, neither as guardian nor as manager was Mr Garth entitled to bind the minor by a contract to purchase immovable property There was no authority in favour of so far extending his powers The contract was not valid (**see** 39 I A pp 3-4, not the I.L R. Calcutta series, report which does not have counsel's arguments) At what law? Obviously at Muhammadan law.

The experts in Muhammadan law accepted the decision without a murmur. **See** Sir Roland Wilson's **Anglo-Muhammadan Law** (fifth edn, 1921), p 193, F B Tyabji's **Muhammadan Law,** section 272 (2) (third edn, p. 299), and A. A A. Fyzee, **Outlines of Muhammadan Law** (third edn, 1964), p. 194, who follows Tyabji, but puts the matter (no doubt correctly) in wider terms "Nor can a guardian purchase property on behalf of the minor"

What grounds could there be for supposing that the Muslim case referred to Hindus? A clever advocate could, of course, utilise the bald, unqualified words of the judgment. But we must always remember that **a case is authority for what it decides, and no more.** The judgment did seem to read as if the lack of competence depended on a lack of mutuality, and, put in those terms, the equity consi-

15 L R. (1918) 45 I A 73 35 M.L J 422 20 Bom.L R 1022. 83 ff. This is the leading case. A A A Fyzee, *Cases in the Muhammadan Law of India and Pakistan* (O U.P, Madras, *etc.*, 1965), No. 22, p. 260 ff

derations seemed to be paramount; upon that footing there seemed to be no difference between the personal laws. The powers of a guardian of a Hindu minor are certainly not confined to sale (as was duly noticed in the Madras Full Bench case), but extend in proper cases also to purchases The powers of a guardian are not so wide as those of a manager of a joint family, and a conservative approach is generally usual, but the better view[16] would uphold acts by the guardian which are decisively for the minor's benefit, particularly if the nature of the security is better after the transaction than it was before The notion that the 'Muslim case' could possibly affect the Hindu law relating to the powers of a guardian is implicit throughout our Madras Full Bench case and earlier cases, but, it is submitted, this was a mistaken notion. From where did it come? It is very difficult to trace the source of the error. Recent additions of Mayne's **Treatise on Hindu Law and Usage** (eleventh edn, p .292) copy out the material cited above from **Mir Sarwarjan** v. **Fakhruddin**[17] exactly as if it would apply to Hindus This was a careless slip, as we see from the struggles of the various High Courts to emerge from under its unfortunate effects. Not all the cases cited by Mayne at p 293, note (g), are relevant, but Sir Shadi Lal's comment at **Malla** v **Muhammad Sharif**[17-a] shows sufficient scepticism of the alleged doctrine, even where the minor was a Muhammadan Mulla's **Hindu Law** (thirteenth edn, 1966), p. 530, tends to follow Mayne's lead, adding that it is the executory contract which alone fails for want of mutuality, an ingenious attempt to limit the doctrine Sir Hari Singh Gour, **Hindu Code** (fourth edn, 1938), p 297, section 816, attempts to confine the case to the question of ratification of a void contract he does not explain the case in any other way Mulla's most recent edition naturally cites **Subrahmanyam** v. **Subba Rao**[18] (which was not available to Gour), the distinction between the apparently dissonant authorities is allowed to appear from the contrast between their facts but no explanation of the anomalous rule (or rather alleged rule) is offered. S. V Gupte, **Hindu Law in British India,** second edn, Article 266, p 1046, accepts briefly that our 'Muslim case' applies to Hindu minors, and their guardians, without comment, the alleged rule is expanded slightly at p. 1047. N R. Raghavachariar, **Hindu Law, Principles and Precedents** (fifth edn, 1965) pp 195, 203, refers to the case At the earlier page he allows to stand an older notion of its effect at the latter page he correctly shows the effect of the Andhra Pradesh decision of 1956, relegating our 'Muslim case' to the background (without stating their reasons, which, as we have seen, were dubious.

Thus our textbooks did not protect us, at any rate in their earlier editions, from wrongly supposing that the **Mir Sarwarjan case**[18-a] limited the powers of a **Hindu** guardian or manager It is understandable that Mantha Ramamurthi, in the fourth edition of Iyer and Anand's **Law of Specific Relief,** at p 101 rejoices in the 1948

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16 N R Raghavachariar, *Hindu Law* (cited below), p 202 , Dorrett, *Introduction to Modern Hindu Law* (O U P , Madras, *etc* , 1963), section 94, p 76 The warning at *T Appanna* v *Nakkava*, (1963) 1 An W R 302 A I R 1963 Andh Pra 418 deserves to be noted See also *Govinda* v. *Pathimunnissa*, A I R 1958 Mad 510 (1958) 2 M L J 28

17 *See* n 10 above

17-*a* (1926) I L R 8 Lah 212, 214.

18. I.L R (1949) Mad 141 : L R. 75 I.A 115 . (1948) 2 M L J 22 : A I R. 1948 P.C. 95.

18-*a*. See n 10 above.

Privy Council decision and claims that it pushes our 'Muslim case' into the background, for the 1911 case was discussed in the High Court's judgment under appeal, so that their Lordships must have had notice of it On that footing the 1911 case is no longer to be used to restrain minors' suing for specific performance of contracts for the purchase of property entered into by their guardians[19], **provided** (of course) **they are non-Muslim minors.** Guardians of Muslim minors can hardly ever purchase property out of their ward's estates, and can never purchase immovable property whether the coming Code of Family Law, or whatever it will be called, will remove this restriction so far as Muslims are concerned is one of the questions which we must let time solve for us Meanwhile we know what the law is

As I have attempted to show, the real reason why the Privy Council made no reference to the 1911 case in their judgment in 1948 must simply have been that they realised that the case, though enjoying a spurious life in India, was in fact irrelevant to a dispute about the powers of a **Hindu** minor's guardian

Thus Madras is right in believing that **Mir Sarwarjan**[19-a] is still good law notwithstanding **Subrahmanyam** v **Subba Rao.**[19-b] But this is not because the 1911 case dealt with agreements to purchase, or executory contracts[20], but because it is really a case on the personal law of the parties, **viz.,** Muslims

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19 See *Gujoba Tulsiram Mahar* v *Nilkanth Kesheo,* (1957) 59 Bom L R 1123.

19-*a*. See *n*. 10 above.

19-*b* I L R (1949) Mad 141 L R. 75 I A 115. (1948) 2 M L J. 22· A I R 1948 P.C 95

20. Mulla's *Transfer of Property Act* (fifth edn , Setalvad and Setalvad, 1966), p. 81, note (*x*) ; also p. 311, note (*b*), where the case is assumed to apply to all minors and, as usual, *Venkatachalam* v *Sethuram,* I L R (1933) 56 Mad 433 64 M L J 354 A I.R 1933 Mad. 322 (F.B) is cited as the Indian authority for the ubiquity of the 1911 Privy Council decision The original limitation of *Mir Sarwarjan's case* was not observed even in the able investigation by Varadachariar, J , in *Zeebunnissa Begum* v. *Mrs Danagher,* I L R (1935) 59 Mad 942, 951-6 70 M L J. 477 · A I.R 1936 Mad 564, which was itself a Muslim case.

INSURER'S LIABILITY AND THIRD PARTY RISKS UNDER THE MOTOR VEHICLES ACT: SOME ASPECTS.

By

PROF S VENKATARAMAN

Introductory.—Chapter VIII of the Motor Vehicles Act. 1939, comprising sections 93 to 111 deals with insurance of motor vehicles against third party risks. The provisions ensure that third parties who suffer on account of the user of the motor vehicle would be able to get damages for injuries suffered and that their liability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose use led to the causing of the injuries.[1] The owner of the vehicle has got to insure it compulsorily against third party risks and section 96 casts a vicarious liability on the insurer to pay the damages awarded to the injured person. The proceedings will have to be instituted against the insured in the first instance by the injured party or his legal representatives in case he dies, and it is only after judgment is obtained against the insured that the amount awarded as damages are recoverable from the insurer From the terms of section 96 (2) it is implicit that no proceedings as against the Insurance Company can be maintained by the third party taking advantage of the insurance policy [2] A cheap and expeditious remedy for the enforcement of the substantive rights of the injured person to claim compensation which he could demand in the form of damages in tort in a civil suit has been provided by the Act[3], and a somewhat summary procedure has been laid down for the purpose.

The scheme.—The scheme adumbrated in Chapter VIII is simple. Section 94 makes insurance against third party risks compulsory. Section 95 sets out the requirements of the policies and the limits of liability. Section 96, the crucial provision, declares the duty of the insurer to satisfy the judgment against the person insured in respect of third party risks Under sub-section (1), notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, where judgment in respect of a risk covered by the policy awarding damages has been obtained, the insurer shall, subject to the provisions of the section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder as if he were the judgment-debtor in respect of the liability together with costs and interest. Sub-section (2) provides for notice to the insurer through the Court of the institution of the proceedings, and where such notice has issued the insurer "shall be entitled to be made a party thereto" He can defend the action on any of the grounds specified in the section. Under sections 97 and 101, the insolvency of the insured person does not affect the claims of the injured parties Section 99 states that any settlement between the insurer and the insured, in respect of a claim which may be made by a third party in respect of a liability covered by the policy, will not be valid unless such third party was also a party to the settlement Under section 102, the death of a person in whose favour a certificate of insurance has been issued if it happens after the happening of an event which has given rise to a claim shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer Section 110 empowers the State Government to constitute claims Tribunals for specified areas. The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing attendance of witnesses, etc , and the Tribunal shall be deemed to be a Civil Court

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1 *New Asiatic Insurance Co , Ltd* v *Dhanmal Aswani*, (1964) 2 S C J 428 : A I R 1964 S.C 1736.

2 *Kotaiah* v. *Ramaniah*, (1962) 2 An W.R 232; *Ramaswami* v. *Satyanarayana*, (1958) 1 An.W R 237, *Des Raj* v *Concord of India Insurance Co , Ltd* , A I R. 1951 Punj 114, *British India General Insurance Co* v *Janardhan*, A I R 1938 Bom 217

3 *Unique Motor & General Insurance Co , Ltd* v *Kartar Singh*, I L R (1965) 1 Punj 104 · A I R. 1965 Punj. 102

for the purposes of section 195 and Chap XXXV of the Criminal Procedure Code. Section 110-D provides for appeal to the High Court within 90 days of the award made by the Tribunal, and for sufficient cause shown the High Court may entertain an appeal even after the expiry of such period. No appeal will lie however where the amount in dispute in the appeal is less than Rs. 2,000. Section 110-A lays down that the claim for compensation should be made to the Tribunal constituted for the particular area, in the form of an application, within 60 days of the occurrence of the accident, though, here again, for sufficient cause shown the Tribunal may entertain an application made after the expiry of such period. The claim may be made by the person who has sustained the injury or by his legal representatives in case death resulted from the accident or by an authorised agent. Under section 110-F wherever a Claims Tribunal had been constituted for any area the civil Court's jurisdiction is excluded in regard to claims within that area.[3-a] Sections 111 and 111-A empower the Central and State Governments respectively to frame rules for carrying into effect the provisions of Chap. VIII The Madras Motor Accident Claims Tribunals Rules, 1961, provide for the appearance of lawyers at the discretion of the Tribunal in proceedings before it, for the examination of the applicant on oath, for the appearance and examination of parties, filing of written statements, etc. The Rules also provide that the provisions of the First Schedule to the Code of Civil Procedure, namely, Order 5, rules 9 to 13, and 15 to 20, Order 9, Order 13, rules 3 to 10, Order 16, rules 1 to 21, Order 17, Order 23, rules 1 to 3 shall so far as may be, apply to proceedings before the Claims Tribunal. In the absence of positive authority on any matter the Claims Tribunal can reason by analogy as nearly as possible to such provisions[4] so as to conform to the principles of natural justice

Effect of enactment of Chap. VIII.—The effect of the provisions in Chap VIII is that the only course open to a person injured in a motor accident for claiming compensation is by way of an application to the Claims Tribunal. From the date of the introduction of sections 110 to 110-F into the Chapter, no separate suit or application to any other tribunal would be competent [5] Such actions as were pending on the date when the Tribunal was constituted for any area would proceed, however, in the ordinary way before the ordinary Courts.[6] But if compensation is sought to be claimed after the constitution of the Tribunal for the area in respect of an accident which had taken place prior to its coming into existence, it could be claimed only in accordance with the procedure prescribed in the Act and before the Claims Tribunal, and the civil Court would have no jurisdiction to entertain **an suit** in respect of it [7] All claims by third parties against the insured as well as the insurer are to be settled by the Claims Tribunal only and questions like the policy being invalid on account of its having been produced by fraud should also be decided by the Tribunal alone and no suit in the civil Court could be maintained for the purpose [8]

Scope of sections 110 to 110-F.—Sections 110 to 110-F deal with the constitution, powers, jurisdiction and procedure of the Claims Tribunal. The provisions do not however cover matters like the basis of liability, the circumstances under which it arises, the persons entitled to compensation, the defences available, persons to whom liability attaches, basis for determining compensation and the prin-

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3-a *Union of India* v *Shri Labh Chand Sarma,* A I R 1963 Him Pra 12

4 *M/s Groz Bockert School Ltd* v *Jupiter General Insurance Co , Ltd* , A I R 1965 Punj 477

5 *New India Assurance Co* v *Punjab Roadways,* A I R 1964 Punj 235

6. *Unique Motor & General Insurance Co , Ltd* v *Kartar Singh,* I L R (1965) 1 Punj 104 A I R. 1965 Punj 102

7 See *V G K Bus Service* v *Sethna,* (1965) 1 M L J 203 I L R (1965) 1 Mad 136, *Palani Ammal* v *Safe Services Ltd* , (1965) 2 M L J 285 I L R (1965) 2 Mad 145 but see *Sushma Mehta* v. *C P T Services Ltd.,* A I R 1964 Madh Pra. 133

8 *Diayali Bai* v. *The Jupiter General Insurance Co , Ltd* , I.L.R. (1965) 1 Punj 479 . A I R. 1965 Punj. 311.

ciples relating to its assessment and other related matters. These are matters of substantive law and naturally in the absence of any guidance in the sections the general law will apply In **Ayesha Begum** v. **Veerappan**[9] the question whether the compensation awarded was arbitrary was tested with reference to the well-settled principles of the general law relating to assessment of damages To state then that sections 110 to 110-F constitute a self-contained code providing for compensation and the machinery of adjudication in cases of motor accidents [10] is an over-simplification. In **Shri Ram Pratap** v. **General Manager, Punjab Roadways**[10]-a, it is held that those sections merely deal with the subject of the substitution of the Motor Accidents Claims Tribunal in place of Civil Courts for the purpose of adjudicating on claims for compensation in respect of accidents involving the death or bodily injury to persons arising out of the use of the motor vehicle, that they do not deal with the question as to who is to be held liable and in what circumstances if any injury results from the accident, that the sections do not in any way override the law of torts, and hence it cannot be accepted that under section 110 in order to claim compensation, it is not necessary to establish that the accident was the result of negligence on the part of the owner or driver of the vehicle

Policy should subsist.—The insurer will not be liable if at the relevant time the policy has ceased to subsist It is significant that section 96 (1) carries the words ' being a liability covered by the terms of the policy". The section corresponds to section 10 (1) of the English Road Traffic Act, 1934 Under the English law, a motor insurance policy is automatically avoided on death or bankruptcy or sale of the car by the insured, and the section does not apply to such cases [11] In **Rogerson** v **Scottish Automobile & General Insurance Co. Ltd.**[12], Lord Buckmaster said "To me this policy depends upon the hypothesis that there is, in fact, an insured car When once the car which is the subject of the policy is sold, the owner's right in respect of it ceases and the policy so far as the car is concerned is at an end " The principle was applied where an insurance policy carried a clause extending the cover against third party risks to the temporary user of another car by the insured during the currency of the policy, and an accident occurred in the course of such user after the car covered by the policy had been sold In the words of Goddard, J., in **Tattersall** v. **Drysdale**[13] "The policy insured the plaintiff in respect of the ownership and user of the specified car, and when he divested himself of his interest in that car the extension clause ceased to have effect" In **Peters** v **General Accident & Life Assurance Corporation Ltd.**[14], a motor car stated to have been insured with the General Accident and Life Insurance Corporation knocked down one Peters at a time when a certain person, Popex was driving the vehicle. Peters recovered judgment against Popex for damages and claimed also the right to recover the same from the Insurance Company The insurance had in fact been effected by Coomber who was the original owner of the car but had later on sold it to Popex The accident in question occurred subsequent to such sale. Goddard, J., observed "I am bound to hold that, when Mr Coomber parted with his car his insurance **qua** that car lapsed and that there was no insurance" The principle that on a sale of the insured car subsequent to the effecting of the insurance the policy lapses would apply even if the contract of sale was unlawful provided the property in the car had passed to the transferee [15] In India while section 102 in

9 (1966) 1 M L J 374

10 *Mohammed Habibullah* v *Seethammal*, (1966) 2 M L J 378

10-a 64 Punj L R 448 A I R 1962 Punj 540

11. Shawcross, Law of Motor Insurance, 2nd Edn , p 28

12 (1931) 146 L T 26 48 T L R 17

13 (1935) 2 K B 174

14 (1937) 4 All E R. 628

15 See *Singh* v *Ali*, (1960) A C 167 (P C)

Chap VIII of the Act preserves the insurer's liability after the death of the insured and cases of the insured's bankruptcy are provided for in section 97, cases of sale or assignment of the insured vehicle are not similarly provided In the circumstances it has been held that the English law principle of automatic avoidance of the insurance policy on a sale of the vehicle covered by the insurance applies equally in this country.[16] In **Bhoopathy** v. **Vijayalakshmi**[17], one Venkataswami had a Vauxhall saloon car which he had insured with the Hercules Insurance Company under a comprehensive policy covering third party risks and the cover was available till 5th December, 1958 On 11th August, 1958, he sold the car to his daughter and the transfer of ownership had become complete On the forenoon of 4th December, 1958 the car knocked down the plaintiff as he was riding on his bicycle. The plaintiff filed a claim for recovery of damages from daughter and the insurance company In holding that the insurer was not liable to the plaintiff, the Court observed "The continued ownership of the car with the insured is basic to the subsistence of the policy and once the subject-matter of the policy is gone, so when parted with by the insured, the policy automatically lapses and there is nothing for the insurer to avoid it"

Legal position of the insurer.—Under Chap VIII, the policy should be expressed in terms that it insures the person specified in it and in respect of the vehicle to which it relates Even apart from Chap. VIII, a contract of motor vehicle insurance is one between the insurer and the insured and its subject-matter is the car specified in it, and it is the risk arising out of its use that the insurer undertakes to compensate against. Where such a contract provides for indemnity to the insured against third party risks, the third party being a stranger to the contract, cannot enforce it himself against the insurer Neither common law nor the general principles of the law of contracts give a third party a cause of action against the insurer. A statutory liability is however imposed on the insurer by section 96 (1) to satisfy judgments against the persons insured in respect of third party risk. The insurer is charged with the obligation to satisfy it to the extent of the cover under the terms of the policy just as if he were a judgment-debtor. The third party who has obtained the judgment against the insured is, as it were, subrogated to his position **vis a vis** the insurer. Such a position results only when the conditions set out in section 96 (2) are fulfilled. This is primarily to enable the insurer to apply to be made a party to the proceedings so that he may defend the action as a party, in the action by the third party against the insured. Section 96 (2) enumerates in clauses (a), (b) and (c) the grounds on which the insurer may defend himself. In **British India General Insurance Co. Ltd.** v. **Capt. Itbar Singh**[18], the question arose whether the defences available to an insurer added as a party under section 96 (2) were only those mentioned therein. Holding that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured for damages for causing the injury and that the question of the defences available to the insurer is one of interpretation of the sub-section, the Supreme Court observed: "It would follow that the insurer is entitled to defend on any of the grounds enumerated and no others If it were not so, then of course no grounds need have been enumerated When the grounds of defence have been specified they cannot be added to To do that would be adding words to the Statute" The Supreme Court added that "the only manner of avoiding liability provided for in sub-section (2) is through the defences there mentioned" It is to be noted that these observations relate to defences open to the insurer exercising his right to be made a party on receipt of the notice through Court of the proceedings brought against the insured It is one thing to state that if the insurer is made a party

16 *Bhoopathy* v *Vijayalakshmi*, (1965) 2 M L J 466 [overruling *Madras Motor Insurance Co* v *Mohammed Mustapa Badsha*, (1960) 2 M L J 202)], *Des Raj* v *Concord of India Insurance Co*, A I R. 1951 Punj. 104

17 (1965) 2 M L J 466

18. (1960) S C J 44. (1960) 1 S C R 168 A I R 1959 S C 1331

he can urge only the defences set out in the section and no others, but it is an altogether different thing for the insurer to claim to defend the action in the name of the insured and urge all the defences that would be open to the latter The only question would be under what circumstances such a right would be available to the insurer. Adverting to this aspect of the matter the Supreme Court observed. "We are furthermore not convinced that the statute causes any hardship The insurer has the right provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, providing for a right to defend the action in the name of the assured and this he has full liberty to do" Thus the limitations of section 96 (2) cannot operate where the insurer has made an express contract with the insured or a specific reservation in the policy itself stipulating for the right to defend the action in the name of the assured and he will be entitled to take all defences in the like manner and to the like extent as could have been raised by the assured himself [19] The defence based on the non-subsistence of the policy due to automatic avoidance by reason of the sale of the vehicle before the occurrence of the accident is also always open to him.

Further questions however arise whether in the absence of an express contract or reservation clause in the policy itself the insurer can be permitted to defend the action in the name of the insured and on what grounds Independently of section 96, the Insurance Company cannot be made a party to an action between the injured party and the insured The insurer cannot be made a party under the provisions of Order 1, rule 10 of the Civil Procedure Code either Under that provision a person can be added as party only in two cases. one is when he ought to have been joined and is not, and the other is when without his presence the questions in the suit cannot be completely decided. As there is no privity between the injured party and the insurer there is no obligation to implead the latter in the action and he is not a necessary party The insurer cannot be regarded even as a proper party since it cannot be said that the question in the action cannot be completely decided in the absence of the insurer. It is no doubt curious that although the Legislature has enjoined upon the plaintiff to serve the notice upon the Insurance Company through the Court and although the Legislature has cast a liability on the Insurance Company, the Legislature has not given any right to the Company to defend the action in all circumstances in its own right.[20] The object of providing a notice to the Insurance Company is really twofold. One is to enable it to defend the action in its own name, if it is challenging the claim on any of the grounds mentioned in section 96 (2) But the other purpose and object of the notice which is equally important is to give intimation to the insurer that an action has been started against the defendant so as to enable the insurer to see that that action is properly defended and that the decree does not go against the defendant by default or that a decree is not passed collusively against the defendant."[21] To enable the insurer to achieve this end, whenever the ends of justice so requires, the Court can exercise its powers under section 151, Civil Procedure Code In the language of Chagla, C J "Apart from authorities . it is a principle of elementary justice that a liability cannot be cast upon a party without that party being an opportunity to resist the claim which it has ultimately to satisfy . the very object of section 151 is to empower the Court to deal with those various situations which arise from time to time which could not possibly have been contemplated by the Legislature and could not have been dealt with by the Legislature The Legislature has not dealt at all with a case where the defendant does not wish to resist the plaintiff's claim He may not wish to resist it

19 *New India Assurance Co Ltd* v *Sm Janak Dulari*, A I R 1966 All 266 See also *Unique Motor & General Insurance Co Ltd , Bombay* v *Kartar Singh*, A.I R 1965 Punj 102

20 *Sarupsing Mangatsingh* v. *Nilkant*, (1952) 54 Bom L R 557 · A I.R 1953 Bom 109

21 See *Royal Insurance Co* v *Abdul Mohammed*, A I R. 1955 Bom 39

because he may not be interested, knowing that the decree will ultimately be satisfied by the Insurance Company He may collude with the plaintiff, he may submit to a consent decree which may be prejudicial to the interests of the Insurance Company "[22] The learned Chief Justice added· "If a contract between the parties can permit the Court to act in a manner not contemplated by the Statute and to permit the Insurance Company to defend in the name of the defendant, why cannot the interests of justice equally permit the Court to allow the Insurance Company to defend in the name of the defendant ? Surely the interests of justice should stand on a higher pedestal than the mere sanctity of contract".[23] In a similar vein, in another case[24], Tendolkar, J , observed "In my opinion this Court is clothed with all the equity jurisdiction that is vested in the King's Bench Division under the Judicature Acts in England, and for the purposes of securing justice as between the parties to a litigation and third parties affected by the litigation the Court has inherent jurisdiction to make any order that it may consider just and equitable. It seems to me to be a matter of elementary justice to the insurer that if a judgment is to be enforced against him he should have the right to defend the suit before judgment not by being a party which he cannot be except on any of the grounds set out in section 96 (2) but through the defendant or in the name of the defendant. Ordinarily he would have to defend the suit through the defendant and therefore he must in the first instance offer to the insured that he shall indemnify him against the consequences of defending the suit and request the insured to defend the suit. But if the insured unreasonably refuses to defend the suit on those terms it seems to me that this Court has ample jurisdiction to authorise the insurer to enter an appearance and to defend the suit in the name of the insured so that the judgment does not go by default". It also follows from these observations that where notice issues to the insurer through the Court under section 96 (2) and the insurer does not desire to defend on any of the grounds set out in that section and so does not get himself impleaded as a party but apprehending that the insured may not defend the action or defend it properly applies to the Court to be permitted to defend in the right of the insured following the appropriate procedure, the Court may in the exercise of its inherent powers grant the insurer the necessary permission Thus unreasonable rejection by the insured of the indemnity offered by the insurer in respect of the defence of the action, apprehension that the defendant may let the defence go by default, or that he is indifferent to or uninterested in the matter of defending the action properly, or that he would collude with the plaintiff would constitute justification for permitting the insurer to defend the action in the right of the insured In **Windsor** v **Chalcraft**[25] in a motor accident case a judgment was given against the defendant for default of appearance, and on the application of the underwriters the Master made an order that the judgment be set aside and that the underwriters be at liberty to appear in the action in the name of the defendant and defend The Judge at chambers set aside the order of the Master, and, on further appeal, the Court of Appeal rescinded the order of the Judge and restored that of the Master. The Lords Justices felt that the underwriters were the persons aggrieved by the judgment as they would have to satisfy the same and so were entitled to an order setting aside the judgment and giving them leave to enter an appearance in the action in the name of the defendant or in their own name and deliver a defence True it was that in that case there was a condition in the policy by which the assured had bound himself to permit the underwriters to use his name and that the scope of Order XXVII, rule 15 of the English Supreme Court Rules was wider than that of Order 9, rule 13 of the Civil Procedure Code But permission in the case was granted on principles transcending such considerations Greer, L J quoted as authority binding on him the observations of Bowen,

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22 *Sarupsing Mangatsing* v. *Nilkant*, (1952) 54 Bom L.R. 557 : A I.R. 1953 Bom 109.

23 *Ibid*

24 *Vimlabai* v *General Assurance Society Ltd.*, A I R. 1955 Bom. 278.

25. (1939) 1 K B 279 (C A.)

L J , in **Jacques v. Harrison**[1] that a stranger affected by an order may "in the first place, obtain the defendant's leave to use the defendant's name if the defendant has not already bound himself to allow such use of his name to be made." Following the principle of these judgments it was held by the Bombay High Court that the insurer through the defendant may be granted, in the exercise of the inherent powers of the Court, even permission to apply for the setting aside of an **ex parte** decree passed against the defendant if the Court was satisfied that the insurer had not reasonable notice and opportunity to defend the action [2] In the Bombay case, one Sarup Singh, the defendant who was driving a motor vehicle knocked down the plaintiff, Nilkant, and caused severe personal injuries to him That was on 16th October, 1946 On 14th October, 1947 the plaintiff filed a suit for damages against the defendant Summons was served on the defendant by substituted service on 6th December, 1947 A firm of solicitors filed appearance on behalf of the defendant but no written statement was filed On 21st July, 1951 notice under section 96 of the Motor Vehicles Act was served on the Unique Motor and General Insurance Company Ltd , with which the vehicle had been insured When the suit came on for hearing on 27th June, 1951, the defendant being absent, an **ex parte** decree was passed against him for Rs 11,300 On 26th July, 1951, an application was taken out by the defendant to set aside the **ex parte** decree but it was dismissed The Bombay High Court held that the notice required to be served through Court to the insurer must be of a reasonable duration, and if an **ex parte** decree is passed against the defendant by whom the policy is effected and if the insurer through the defendant satisfies the Court that the insurer did not have a reasonable opportunity to defend the action, the Court acting under its inherent jurisdiction can set aside the **ex parte** decree Unlike the Bombay decisions which have adopted a spacious and liberal approach in these matters by resort to their inherent powers wherever the ends of justice so required, the decisions in Madras show a relatively cramped outlook and rigidity of approach These trends are apparent from the view that sections 110 to 110-F of the Motor Vehicles Act constitute a self-contained code[3], and from the observation "It is true that section 96 of the Act gives the Insurance Company the right to be made a party to defend the action But the Insurance Company cannot avoid its liability except by establishing such defences as are catalogued in sub-section (2)"[4] "The latter dictum, by itself, is only an incomplete statement of the law It does not seem to appreciate that though Chap VIII of the Motor Vehicles Act might be intended to provide a cheap and expeditious remedy and by a somewhat summary procedure to the injured person and in case of his death to his legal representatives the Act cannot operate to deprive the insurer, a third party to the action between the injured party and the defendant, of any right he may have outside the statute under the general law to the extent to which such rights have not been the subject of express abrogation or curb under the statute The Supreme Court itself has recognised in **British India General Insurance Co. Ltd.** v **Capt. Itbar Singh**[5] that the Insurance Company can defend the action in the right of the insured and through him and on all the grounds open to him if there is a contract or a specific provision in the policy There are in addition the other varieties of situations referred to in the Bombay decisions when also the insurer can seek the permission of the Court to defend the action in that way. Above all there is the right of the insurer under the general law to plead that consequent on the sale of the vehicle before the accident resulting in injuries to the plaintiff, there was automatic avoidance of the insurance policy and the Company could not be held liable In **New India Assurance Co.** v **Janak**

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1. (1884) 12 Q B D 165.
2. (1952) 54 Bom L R 557 A I R 1953 Bom 109
3. *Mohammed Habibullah* v *Seethammal*, (1966) 2 M L J 378
4. See *General Assurance Society Ltd* v *Mohammed Hussain*, (1966) 2 M L J 120, 123 , *Ayesha Begum* v. *Veerappan*, (1966) 1 M L J 374.
5. (1960) S C J. 44 . (1960) 1 S C R 168 . A I R 1959 S C 1331

Dulari[6], it is pointed out that the defences open to an Insurance Company when a notice is issued to it under the section are not exhaustive; that it cannot be held that in no circumstances can the Company be permitted to raise a defence outside those specifically provided under section 96 (2), that the Insurance Company is confined to such defences only when it has been impleaded as a defendant, but not in a case where there is an express contract in the terms of the insurance policy itself or otherwise any reservation of the right to defend the action in the name of the insured, that in the latter circumstances there are no restrictions put by the section on the Insurance Company to raise only the defences under section 96 (2); and that it is entitled to take all defences in the like manner and to the like extent as the assured himself can raise

Suspension of policy.—It has been recognised that an alteration which may not affect the subject-matter of the policy may yet amount to an alteration in the risk, and in such a case the risk as altered no longer corresponds to or is identical with the risk as described in the policy Where that happens, unless the policy expressly so provides, the alteration in the risk will not avoid the policy but will suspend its operation so long as the alteration continues If the subject-matter is again used in accordance with the description, the policy reattaches[7] In an English case[8], a motor vehicle had been insured for commercial travelling. When it was used for carrying passengers and in the course of such user an accident occurred it was held that the insurers were not liable since the occurrence was not within the risk actually covered, that the policy remained suspended for the duration of the unpermitted user, and that it would reattach on resumption of the permitted user This principle is one of general insurance law. In **Unique Motor & General Insurance Co. v Kannappa Naicker**[9], a transport company had left a passenger bus belonging to it in a workshop for effecting certain repairs After carrying out the repairs the mechanic who had attended to the same took the vehicle out for a test drive While so driving he hit a boy and caused his death It was found that the concerned mechanic had no licence to drive a heavy vehicle. The insurance policy also contained a clause that the insurer will not be liable in respect of any accident sustained or incurred while the vehicle was being driven by any person other than a driver It was held that the mechanic who drove the vehicle was not an agent or servant of the transport company and the company had no control over him at the time of the accident, that when the bus was involved in the accident the insurance policy was suspended, and that in the circumstances the insurers were not liable Though in the instant case there was an express stipulation in the policy itself excluding liability, the general law doctrine of automatic suspension of the policy by reason of alteration of the risk described in the policy was also referred to.

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6. 1966 All L J. 763 A I R 1966 All 266, see also *Concord of India Insurance Co. Ltd.* v. *Machado,* A.I R 1966 Mys 346
7. Halsbury's Laws of England, 3rd Edn, Vol. 22, para 445
8. *Robberts* v *Anglo-Saxon Insurance Association Ltd*, 137 L T 243
9. (1966) 2 M L J 100.

NOTE TO OUR READERS.

Regarding the note on late Sri T. M Krishnaswami Iyer in part 2 of (1967) 1 M L.J (Journal) dated 19th January, 1967, it is pointed out that Sri T. M Krishnaswami Iyer was a Member of the Council of Law Reporting and not on the Editorial Board of the Indian Law Reports (Madras Series) at any time.

A CASE FOR AMENDMENT OF THE COMPENSATORY PROVISIONS OF THE MOTOR VEHICLES ACT.

By

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I. Introductory.

The compensatory provisions of the Motor Vehicles Act, 1939[1], contained in sections 110 to 110-F which were inserted by an amendment in 1956[2], not merely create special Tribunals to deal with claims for compensation for motor accidents but also purport to lay down principles of liability. The provisions dealing with such principles are vague and sometimes even misleading in several important respects concerning claims for compensation, such as the nature of the liability, the persons liable, the persons to whom such liability is owed, the persons entitled to sue and the principles according to which compensation is to be assessed. Thereby Parliament seems to have passed on a whole problem to the Courts of Law without taking the trouble of defining legal terms or enunciating clear and precise guidelines. And this state of affairs tempts us to recall the very significant remarks of Lord du Parcq made in a similar context

"To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the Courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned."[3]

It may be pointed out that the immediate cause for this enquiry (into the nature, scope and effect of the compensatory provisions) is a judgment of a Division Bench of the Madras High Court in **Mohd. Habibullah** v. **Seethammal**[4], wherein a claim for compensation made by the married sister of a person killed in a motor accident was allowed for her own benefit. Further, the Bench pronounced that "the Legislature has deliberately enacted the Motor Vehicles Act, and provided by virtue of sections 110 to 110-F of that Act, not merely **a self-contained code**[5] for the adjudication of claims to compensation on behalf of the victims of a motor accident, but also a complete machinery for the adjudication of such instances."[6] The judgment not merely looks like an attempt at an exercise in judicial

1. Central Act IV of 1939

2 The Motor Vehicles (Amendment) Act C of 1956 The Act, including the amendment, is hereinafter referred to as the Motor Vehicles Act simply, unless stated otherwise.

3 *Cutler* v *Wandsworth Stadium Ltd*, (1949) A C 398 (H L) The question related to whether the statute in question, which imposed a severe criminal penalty for its violation, also afforded a civil remedy of damages to plaintiff

4. (1966) 2 M L J 378, delivered on 4th July, 1966, on appeal from a judgment of Venkatadri, J., on appeal from an order of the Motor Accidents Claims Tribunal, Madras.

5. Emphasis here, and anywhere else in this article, are supplied by the writer.

6. (1960) 2 M.L.J. 378 at 379.

legislation but would also serve to show how Judges might sometimes be unconsciously led to make some such happy or unhappy choice on account of ill-considered and ill-drafted amendments affecting well-established principles of law. It all turned on an interpretation of the words "legal representative" whom the statute mentioned as a person entitled to file an application for compensation in respect of the death of a person in a motor accident. The married sister happened to be the immediate next-of-kin of the victim who died a bachelor, without leaving a parent or a child or any other heir. The Claims Tribunal and a single Judge of the High Court on appeal found that it was otherwise a justifiable case for compensation The only question discussed by the Division Bench on second appeal was whether she, being a person not mentioned in section 1 of the Fatal Accidents Act, 1855 was entitled to compensation for her benefit The Bench came to the conclusion that she was so entitled The Bench agreed that she was not a "representative" in the sense in which that expression was understood in the Fatal Accidents Act but refused to look into that Act for guidance on the ground that sections 110 to 110-F "make no mention of any kind concerning any of the provisions of the Fatal Accidents Act, and do not incorporate any such provision even by the most oblique reference".[7] She being the "immediate next-of-kin and legal representative of the victim", the Bench remarked, her claim was justly recognised by the Courts.

It is proposed, in the following lines, to attempt a critical appreciation of the relevant statutory provisions in the light of well established principles of the law of torts and recent trends in judicial decisions, and thereby to emphasise the need for an amendment of the compensatory provisions of the Motor Vehicles Act.

II. Pre-1956 Legal Position.

Prior to 1956 the right to claim damages for personal injuries sustained in a motor accident, and the nature and scope of the liability therefor, were governed by the general principles of the law of torts, the Motor Vehicles Act, 1939 had no separate provisions in that behalf. It is unnecessary to cite authorities in support of this proposition. The general principles of the law of torts and the Fatal Accidents Act, 1855 governed the nature as well as scope of liability for fatal motor accidents.[8] As the Indian law of torts is based largely on the English law of torts the legal position in England may be briefly outlined here.

It was held in **Baker** v. **Bolton**[9] that in a civil Court the death of a human being could not be complained of as an injury and, consequently, the plaintiff-husband could not recover damages for his loss of his wife's services and society and the distress of mind he had suffered on account of her death. Thus, according to the rule in **Baker** v **Bolton**[10], a third party cannot recover compensation for loss incurred by him as a result of the death of a person killed by another's wrongful conduct. This rule received the approval of the House of Lords in the **Amerika**[11] wherein Lord Sumner remarked that "Never during the many centuries that have passed since reports of the decisions of English Courts began has the recovery of damages for the death of a human being as a civil injury been recorded." When

7 Ibid.

8 *Gobald Motor Service* v *Velusami*, (1962) 1 An W R (S C) 105 (1962) 1 M L J (S C) 105 . (1962) 1 S C J 206 (1962) M L J (Crl) 120 A I R (1962) S C 1 contains the most authoritative exposition of the law This article is devoted to an examination of the position regarding fatal motor accidents and only secondarily it deals with accidents resulting in non-fatal injuries

9 1 Camp 493 170 E R 1033 (*nisi prius*) decided on 8th December, 1808 For a brief yet comprehensive survey of the rule, see an article by K Gupteswar, " The Rule Against Recovery for Wrongful Death (An Investigation into its historical Basis, Scope and Rationale) ", (1965) XI Lucknow Law Journal, pp. 91-106.

10 Ibid

11. (1917) A.C. 38 (H L.).

railways were introduced in England in the middle of the nineteenth century deaths became frequent due to railway accidents. They brought to the fore the great hardship caused by the rule in **Baker** v **Bolton.**[12] If a person was injured in an accident he could recover damages but if he was killed his family could recover nothing. This provoked the remark by Dr Winfield, "if there were to be an accident at all, the more people who broke their necks instead of being merely injured in it, the better for the railway company" Consequently, the Fatal Accidents Act, 1846 (9 & 10 Vict c. 93) was passed. The Act created a special exception to the rule in **Baker** v. **Bolton**[13] and benefited to a large extent certain relatives of the person killed. Liability under the Act is not for pure accident but only for any wrongful act, neglect or default including a wilful wrong[14] Thus liability under the Act is what may be described as fault liability but not absolute liability The right of action is a new one and not a continuation or survival of a cause of action which was vested in the deceased. There is, however, no right of action to a dependent unless the deceased himself could have sued had he been merely injured and not killed due to the defendant's act.[15] Therefore, if the deceased had, even in the interval between the accident and his death, accepted full compensation from the defendant and thereby extinguished his right of action, or if he had relieved the defendant from liability by a contractual stipulation,[16] or rendered himself open to the plea of **volenti non fit injuria,** the dependants cannot recover damages[17] The availability of a plea of contributory negligence against the deceased would not, since the Law Reform (Contributory Negligence) Act, 1945, result necessarily in a denial of compensation but only a reduction in the amount of compensation[18] The Act is silent as to the principles or the basis on which the damages to the dependants are to be assessed except stating that damages should be "proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought".[19] However, the Courts did a remarkable job in firmly establishing a set of principles in that behalf There is no question of nominal damages or sentimental damages for the dependant's sense of bereavement or pain and suffering on account of the death. The compensation is to be related to the loss of pecuniary benefit to the dependant as a result of the death It may be loss of actual benefit or one reasonably expected It is not necessary to prove a right to such benefit, it is enough even if it be voluntary bounty. To quote Lord Wright, "it is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabi-

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12 *See* note 9

13. *See* note 9.

14 Pollock, *Torts*, (1951) p 70

15 For this reason the right of action is regarded as derivative in one sense · an article by Glanville Williams, " Some Reforms in the Law of Tort " (1961) 24 Mod L R 100 at p 106

16 If, however, the contract merely limits the quantum of damages recoverable, instead of precluding a remedy by action altogether, the contract has no effect either as a bar of the statutory remedy or as a limitation on the quantum of damages See, generally, Chapman, *Statutes on the Law of Torts* p 36

17 Charlesworth, *Negligence* Second edition, pp 538-40, *Griffiths* v *Earl of Dudley,* (1882) 9 Q B D 357

18 In India there is no similar legislation The defence of common employment stood abolished by the Law Reform (Personal Injuries) Act, 1948 in England The writer's view that the defence of common employment can be no more available in India may be noted in this connection: an article by K Gupteswar, " The Defence of Common Employment in the Indian Law of Tort ", (1959) S C J pp 177-190

19 Section 2, Fatal Accidents Act, 1846 (9 & 10 Vict c. 93),

lities".[20] The balance of loss and gain to a dependant must be taken into account, the position of each dependant being considered separately. There is to be a balancing, on the one hand, of the loss to him of the future pecuniary benefit and, on the other, any pecuniary advantage from whatever source which comes to him as a result of the death [21] Where the same person happens to be the claimant as a dependant under the Fatal Accidents Acts and as an executor or administrator under the Law Reform (Miscellaneous Provisions) Act, 1934, the Courts evolved a sort of equitable principle that damages should not be allowed twice over but reduced **pro tanto.**[22] The above principles were laid down in a series of decisions, of which the leading are **Rose** v. **Ford**[23] and **Davies** v. **Powell Duffryn Associated Collieries Ltd.**[24] These principles were followed with approval by the Supreme Court of India in **Gobald Motor Service** v **Velusami**[25] for the purpose of interpretation of the provisions in sections 1 and 2 of the Fatal Accidents Act, 1855. Justice Subba Rao (as he then was) observed that "While section 1 of the Act is in substance a reproduction of the English Fatal Accidents Acts, 9 & 10 Vict ch. 93, known as the Lord Campbell's Acts, section 2 thereof corresponds to a provision enacted in England by the Law Reform (Miscellaneous) Provisions Act, 1934" [1] That case related to a fatal motor accident due to the defendant's negligence and damages were awarded to the father, widow and sons of the deceased, both under section 1 and section 2 The accident having occurred on 20th September, 1947, there was no occasion for considering the effect of sections 110 to 110-F of the Motor Vehicles Act.

III. Changes made by the 1956 amendment.

While such were the principles applied by the Courts in determining the nature and scope of liability of a person responsible for a fatal motor accident, changes were introduced by the insertion of sections 110 to 110-F in the Motor Vehicles Act, 1939 in 1956. The provisions may be classified broadly into two categories, (i) provisions dealing with a separate machinery for adjudication of claims, and (ii) provisions purporting to deal with substantive questions of legal liability.

(i) Machinery: One or more Motor Accidents Claims Tribunals may be constituted by a State Government for such area as may be specified by notification. Their purpose is to adjudicate upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles [2] Where any such Tribunal has been constituted for any area, no civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Tribunal. Further, no injunction in respect of any action taken or to be taken by or before the Tribunal in respect of the claim for compensation shall be granted by a Civil Court.[3] A

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20 *Davies* v *Powell Duffryn Associated Collieries Ltd*, (1942) A C 601 (H L) at p 617.

21 Section 2 of the Fatal Accidents Act, 1959 (7 & 8 Eliz 2 c 65) provides that any insurance money, benefit, pension or gratuity (which has been or will or may be paid as a result of the death shall not be taken into account

22. *See* note 20.

23 (1937) A C 826 (H L).

24 *See* note 20.

25 *See* note 8

1 The passage occurs at p. 6 of the judgment

2. Section 110 (1)

3. Section 110-F

Tribunal is to consist of such number of members as the State Government may think fit to appoint, where it consists of two or more members one of them shall be appointed as the Chairman To be qualified for appointment as a member one must be, or must have been, a Judge of a High Court or a District Judge, or one must be qualified for appointment as a Judge of a High Court[4] Subject to rules that may be made, the Tribunal may follow such summary procedure as it thinks fit It has all the powers of a Civil Court for taking evidence on oath, enforcing attendance of witnesses, discovery and production of documents, etc., and for any other purposes that may be prescribed It is deemed to be a Civil Court for the purpose of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898. Subject to rules, the Tribunal may seek the assistance of any person or persons possessing special knowledge of any matter relevant to the inquiry on hand for the purpose of adjudicating upon a claim for compensation[5] An application for compensation is to be made within sixty days of the occurrence of the accident; delay may be condoned by the Tribunal if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.[6] Every application should be made to the Tribunal having jurisdiction over the area in which the accident occurred and it shall be in such form and shall contain such particulars as may be prescribed.[7] Appeals lie to the High Court within ninety days of the award, at the instance of the aggrieved party, and delay may be excused for sufficient cause However, no appeal shall lie against any award if the amount in dispute in the appeal is less than two thousand rupees[8] Where any money is due from an insurer under an award, the Tribunal may, on application, issue a certificate to the Collector who may thereupon proceed to collect the amount as an arrear of land revenue[9] Government has power to make rules for carrying into effect the provisions of sections 110-110-E.[10]

(ii) Applicable Principles: Claims for compensation should be in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles[11] Application for compensation may be made by (a) the person who has sustained the injury, or (b) where death has resulted from the accident, the legal representatives of the deceased, or (c) any agent duly authorised by the injured person or the legal representatives of the deceased[12] On receipt of an application for compensation, the Tribunal shall give the parties an opportunity of being heard, hold an enquiry into the claim and "may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid, and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer"[13]

IV. Legal effect of the amendment.

Apparently there is a conflict of judicial opinion on the question whether the Motor Vehicles Act merely sets up a separate and exclusive machinery for the

4 Section 110 (2) and (3).

5. Section 110-C

6 Section 110-A (3) *Mehta Goods Carrier (P) Ltd* v *Darshan Devi*, A I R (1962) Punjab 425

7 Section 110-A (2)

8 Section 110-D

9 Section 110-E.

10 Section 111-A

11 Section 110 (1)

12. Section 110-A (1).

13. Section 110-B.

adjudication of claims for compensation in respect of motor accidents resulting in personal injuries or death, leaving the pre-existing legal principles of liability intact, or whether it also contains a self-contained code for the adjudication of such claims. The former view is held by the Punjab High Court[14], while the latter view is expressed by the Madras High Court in **Mohd. Habibullah v Seethammal.**[15] It is important to examine the justification for and soundness of either view. It will be fruitful and will also contribute to a clear analysis if the discussion proceeds under the following heads (a) the nature and basis of the liability, (b) persons liable, (c) persons for whose benefit compensation is awarded, (d) persons entitled to sue for compensation, and (e) principles governing compensation.

(a) The nature and basis of the liability: The Motor Vehicles Act does not specify the circumstances which give rise to liability to pay compensation in respect of motor accident Section 110, sub-section (1), which appears to be the only material provision, merely states that compensation is to be awarded "in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles." The word "accidents" requires definition [16] It may refer to a pure accident, or what may be described as an inevitable accident But, then, it would lead to imposition of liability without fault, akin to liability of an insurer. We have noted already that the word "Accidents", which occurs in the title of the Fatal Accidents Act, 1855 does not occur in the body of the Act: the provision in that Act is explicit, and it is now well established that liability under that Act exists only on proof that death of a person is caused by "wrongful act, neglect, or default" of the other party. Suffice it to say that proof of negligence was required

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14 *Shria Ram Pertap* v *Punjab Roadways, Ambala*, A I R (1962) Punj 540

15 (1966) 2 M L J 378

16 Under the Workmen's Compensation Act, 1923, " accident " is interpreted as an unlooked for mishap and proof of negligence or fault of employer is not required " The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or untoward event which is not expected or designed, " *per* Lord Mac Naghten in *Fenton* v *Thorley & Co* , (1903) A C 443 at p 448 See, Knowles, *Law Relating to Workmen's Compensation*, Fourth edition, pp 11-16 , also, *Laxmibai Atmaram Karangutkar* v *Bombay Port Trust*, (1953) 55 Bom L R 924 Subject to section 3, proviso, consent, contributory negligence, act of God, King's enemies are no defence to the employer Ramaswami Iyer, *Torts*, Sixth edition, p 529 The remedy under the Workmen's Compensation Act is described as a kind of insurance of the workman and the amount paid for his or his dependant's benefit (Section 3) The remedy is alternative to an action for damages under the general law and in the ordinary Courts (Section 3 (5)) Rates of compensation are fixed by the Act, related to average monthly wage (Section 4 read with Schedule IV)

The Employees' State Insurance Act, 1948 provides benefits to an insured employee in respect of employment injury in lieu of compensation under the Workmen's Compensation Act, 1923, in all cases in which the latter Act is replaced by the former (Section 53) Employment injury is substantially same as accident arising out of and in the course of employment (section 2 (8) Right to benefit under the Act is a bar to similar benefits under any other enactment (Section 61) This was held not a bar to the E S I Corporation suing, for damages by way of indemnity under section 67, the Company due to whose negligence an insured employee was killed in a motor accident , *Regional Director* v *D M Breweries Ltd* , A I R (1958) Punjab 136

Under the Indian Railways Act, 1890 , " accident " is described, in section 82-A, as something independent of "wrongful act, neglect or default" of the railway administration Liability exists in case of death of or personal injury to a passenger or damage to his accompanying goods A maximum amount of Rs 20,000 may be awarded in respect of any one person (Section 82-A (2)) The rates of compensation are fixed according to average monthly wage or income of the passenger (The Railway Accidents (Compensation Rules, 1950)) If the Rules apply to a case, the tort law-principles of damages are excluded *Shreenath* v *E I Ry* , A I R (1952) Patna 466 The existence of a right to compensation under the Act does not affect a similar right under any other law in force (section 82-H). Liability of the railway administration to persons other than passengers is governed

and proved in **Gobald Motor Service v Velusami.**[17] The Punjab High Court held that proof of negligence was required before liability could be imposed under the Motor Vehicles Act The question was directly in issue before the High Court in **Shri Ram Pertap v. Punjab Roadways, Ambala**[18], on appeal from the award of the Claims Tribunal The plaintiff was injured while travelling as a passenger in the defendant's bus when it collided with another bus. The plaintiff argued that it was due to skidding and that the principle of **res ipsa loquitur** applied, but the Tribunal and the High Court held that negligence of the driver was not proved. Alternatively, the plaintiff argued that, according to the language of section 110, it was not necessary for the plaintiff to prove negligence on the part of the driver or the owner and that liability could be imposed on the defendant by merely proving that there was an **accident.** The High Court rejected the argument and held that the provision in section 110 should be interpreted, in the absence of anything to the contrary, in accordance with the general principles of the law of torts and that, therefore, negligence on the part of the defendant was a pre-condition for imposition of liability [19] The Bombay High Court confirmed the award of

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by the general tort law principles and the Fatal Accidents Act, 1855, regarding liability as well as amount of compensation *Union of India* v *Lalman Badri Prasad,* A I R (1954) V P 17

The Merchant Shipping Act, 1958 merely prescribes a maximum amount of damages related to the ship's tonnage, where personal injury or death of " any person " is caused without the owner's " actual fault or privity " (Section 352 (1) See, Ramaswamy Iyer, op cit , p 531

The Indian Carriage By Air Act, 1934 imposes liability on the carrier in the event of death or other bodily injury of a passenger on board the aircraft or in the course of embarking or disembarkings The Fatal Accidents Act is excluded (section 2 (4) read with First Schedule, rule 17) It is open to the carrier to avoid liability by proving that he and his agents have taken all necessary measures (rule 20 (1)) Plea of contributory negligence is allowed in avoidance or reduction of damage, (rule 21) In England, under the Carriage by Air Act, 1932, the position is the same (Street, *Torts* , Third edition, p 426) The Indian Act applies to international carriage and may be applied by notification, to internal carriage but has not so far been extended Liability of an internal carrie is, therefore, governed by the Fatal Accidents Act, 1855 *Indian Airlines* v *Madhuri Chaudhuri* A I R (1965) Cal 252 where a Division Bench so held, disapproving an earlier view of a single Judge hat the principles of the Indian Carriage by Air Act, 1934 could be applied to internal carriage, in the absence of a notification, as principles of justice, equity and good conscience *Mukul Dutta* v *Indian Airlines,* A I R (1962) Cal 311 Liability under the Act may be characterised as a "modified System of insurance" *per* Greene, L J, in *Grein* v *Imperial Airways Ltd ,* (1937) 1 K B 50 at p 87

17 *See* note 8 on page 30

18 A I R (1962) Punj 540

19 As this appears to be the only case in which the issue of negligence received detailed consideration, the Court's observations may be noted

" it is true that section 110-B of the Motor Vehicles Act does *not* in terms lay down that it is only when negligence on the part of the driver of the vehicle concerned is established that compensation can be awarded, but then it should be borne in mind that this bunch of sections (110 to 110-F) *merely* deal with the subject of the substitution of the Motor Vehicles Accidents Claims Tribunal in place of civil Courts for the purpose of adjudicating on claims for compensaton in respect of accidents involving the death or bodily injury to persons arising out of the use of motor vehicles They do not deal with the question as to who is to be held liable and in what circumstances, if any, injury results from an accident In order, therefore, to discover the criterion or test for fixing liability irrespective of negligence, to turn to the law of Torts according to which indisputably negligence in causing the accident in question is generally speaking essential to hold the negligent person liable

Nothing has been stated at the Bar to persuade me to hold that the bunch of sections mentioned above in any way override the law of Torts The carindnal principle of civil liability in tort when death or bodily injury has been caused to a person, is negligence or failure to take the requisite amount of care required by law It has not been argued and, indeed not even a suggestion has been thrown, that the claim in question before me is based on any scheme of insurance, contractual or statutory."

damages by the Tribunal under sections 1 and 2 of the Fatal Accidents Act where a boy of six years was killed due to the rash and negligent act of the driver of a motor vehicle, **Abdul Mahomed Aga v. Peter Leo D'Mello.**[20] The Madras High Court held in **Arumukon v. Rethnammal**[21] that the defendant was not liable for a fatal motor accident as it was an inevitable accident and not due to negligence. Thus it will be seen that in all the above cases liability for the consequences of a motor accident was founded only on proof of negligence. It may be added that intentional causing of personal injuries or death will give rise to liability.[22]

(b) Persons liable.—Sections 110 to 110-F do not deal with the question as to who is to be held liable Section 110-B points out that in making the award the Tribunal shall specify the amount which shall be paid by the insurer. The decided cases show that the defendants are the same as in an ordinary tort action, namely, the actual wrongdoer and|or the owner of the vehicle as employer, as well as the Insurance Company Negligence on the part of the driver and|or the owner was required to be proved in every case[23] In one case the non-joinder of the driver of the vehicle as a party was held not to vitiate the proceedings against the owner and the insurance company as no prejudice was caused thereby.[24]

(c) Persons for whose benefit compensation is awarded.—The Motor Vehicles Act merely states that the Tribunal may make an award specifying the person or persons to whom compensation shall be paid.[25] The Act does not indicate who are those persons or to what class they should belong or what description they have to answer. Where the injured party is alive, he is the person entitled to claim damages for his benefit.[1] In **Abdul Mahomed Aga v. Peter Leo D'Mello**[2], the parents were held entitled to compensation for their benefit where their child aged six was killed in a motor accident They were recognised as dependants under section 1 and as executors or administrators under section 2 of the Fatal Accidents Act and, as such, entitled to the amount of compensation. The Bombay High Court thus gave a clear lead that the persons for whose benefit compensation is awarded under the Motor Vehicles Act are no other than the relatives mentioned in the Fatal Accidents Act. The dependants (or the persons for whose benefit an action is brought) under the latter Act are (i) wife, (ii) husband, (iii) parent, including father and mother, grandfather and grandmother, and (iv) child, including son, daughter, grandson, grand-daughter, step-son, and step-daughter.[3] 'Child' includes a child **en ventre sa mere** but not a posthumously adopted son.[4] **Mohd. Habibullah v. Seethammal**[5] is probably the only instance in which, ever since 1855, a married sister of a person killed in a motor accident is given compensation for her own benefit, although she is not one of the relatives mentioned in the Fatal Accidents Act. The Bench admitted in that case that if the Fatal Accidents Act "is to govern the claim, a married sister of the victim, who died a bachelor without leaving behind a wife, child or parents cannot bring forward a

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20. A I R (1965) Bom 21

21 (1966) 1 M L J 554 similarly, in *Ayesha Begum* v *Veerappan*, (1966) 1 M L J 374 the Madras High Court held the defendant liable where a girl of five and a half years was hit and permanently injured due to rash and negligent driving of a lorry.

22 *Mohammad* v *Mt Maiyam*, A I R (1932) Lahore 146, a case of murder, and *Kantilal* v, *Balkrishna*, I L R (1950) Nag 239 (F B), a case of wilful assault resulting in death

23. *Shri Ram Pertap* v *Punjab Roadways, Ambala*, A I R (1962) Punj 540 . *Abdul Mahomed Aga* v *Peter Leo D'Mello*, A I R (1965) Bom 21 *Ayesha Begum* v *Veerappan*, (1966) 1 M L J 374

24 *Mohd Habibullah* v *Seethammal*, (1966) 1 M L J 378

25. Section 110-B

1. *Ayesha Begum* v *Veerappan*, (1966) 1 M L J. 374 , *Shri Ram Pertap* v *Punjab Roadways Ambala*, A I R (1962) Punj 540

2 A I R (1965) Bom 21

3. Section 1-A, para 2 of the Fatal Accidents Act, 1855 It may be stated that in 1951 section 1 was renumbered as section 1-A.

4. *Raghuhath* v. *G. I. P. Ry. Co.*, (1870) 7 Bom. H.C. 113.

claim of this sort **for her own benefit.**" It would appear that the Bench based its decision almost exclusively on an interpretation of the words "legal representatives" occurring in clause (b) of sub-section (1) of section 110-A which deals with persons who may make an application for compensation. It may again be stated that the Motor Vehicles Act nowhere indicates the persons for whose benefit compensation is to be awarded in a case involving a fatal motor accident. It is also not clear from the judgment whether a married sister was held covered by the words "legal representative" as defined in the Code of Civil Procedure, 1908 or independently of it. It may be mentioned that Rules made by the State Governments of Andhra Pradesh, Bihar and Delhi (and perhaps others too) clearly provide that the words shall have the same meaning as is given in clause (11) of section 2 of the Code.[6] The Bench has not explained how, or the reason why, it applied the definition of a person entitled to make an application for compensation to find out whether the person is one for whose benefit the compensation is awarded. For, it is quite possible that one person may be only entitled to make an application for compensation while the benefit of such compensation should go to another.

(d) Persons entitled to sue for compensation.—Section 110-A (1) states that "**An application for compensation** arising out of an accident of the nature specified in sub-section (1) of section 110 may be made where death has resulted from the accident, by the legal representatives of the deceased" It is to be noted that this provision is concerned only with persons who may make an application and not with persons for whose benefit the compensation is to be awarded. It is submitted that there is another provision which deals with the person or persons to whom the compensation shall be paid, namely, section 110-B The two persons need not be identical, though in a large majority of cases they may be so. Para. 2 of section 1-A of the Fatal Accidents Act bears comparison in this connection. It says· "Every such action or suit shall be **for the benefit of the wife, husband parent and child,** if any, of the person whose death shall have been so caused, and shall be **brought by and in the name of the executor, administrator or representative** of the person deceased, and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought."

Such a distinction was clearly and emphatically made as long back as 1870 in **Vinayak Raghunath v. G. I. P. Ry.**[7] There, the deceased, a passenger, was killed in a railway accident due to the negligence of the defendant railway. He left behind his wife and four daughters (three of whom were married already) He had no son, his only son having predeceased him by eight days. But his wife had subsequently adopted a son to him according to Hindu law. That adopted son brought the present suit under section 1 of the Fatal Accidents Act. The Court held that he was a legal representative of the deceased, within the meaning of the provision in section 1 of the Act, although he was not an executor or administrator and although no certificate of heirship was granted to him in respect of the estate of the deceased But the Court ruled that he could not claim the compensation for his own benefit. Compensation was awarded to him for the benefit of the wife and the unmarried daughter, and he was held not entitled to share the amount with them. The reason was he was not a child within the meaning of the provision, and persons other than those mentioned in the provision could not

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6 See, *Commentaries on Motor Vehicles Act*, 1939 by A P Mathur, Fifth edition pp 651, 659 Also, Andhra Pradesh Motor Vehicles Rules, 1964 as amended upto 18th August, 1965, Rule 2 (i) It may be noted that the English Fatal Accidents Act, 1846 entitled only the executor or administator to sue An amendment made to it in 1864 extended such right of action to all or any of the persons for whose benefit such action would have been brought by the executor or administrator it did not use the word "representative"

7. (1870) 7 Bom H.C. 113.

claim compensation for their benefit. "Child", according to the Court, did not include a posthumously adopted son like the plaintiff, whether a son adopted during the lifetime of the deceased could be, was left open. **In Goolbai v. Pestonji**[8], the widow, sons and daughters of a person killed in a motor accident claimed damages under the Fatal Accidents Act Objection was raised that there was no executor or administrator as no representation had been taken to the estate and that the parties being Parsis, and not Hindus or Muslims, they could not be regarded as "representatives" entitled to bring the action. The objection was rejected, the Court holding that the word "representative" did not mean only executors or administrators but included all or any of the persons for whose benefit a suit could be brought under the Act.[9] **Jeet Kumari v. Chittagong E & E Supply Co.**[10], is another case in point. The deceased was killed by holding on to a wire charged with electricity due to the defendant's negligence. His wife, two minor sons and a minor daughter brought an action under section 1 of the Fatal Accidents Act. It was held that those persons were competent to sue for their benefit and that the omission to include the father as one of the beneficiaries, though ordinarily not excusable, could be excused in the circumstances of the particular case. The Court observed

"In our opinion, the **right of action** belongs to any of the persons, namely, the executor, the administrator, or the representative, that is, the widow or husband or parent or child Any one of them can bring the suit for the benefit of the others. There is, therefore, no defect in the present case, because the father had not joined as a plaintiff. . .. The second requisite in a suit under the Fatal Accidents Act is that it must be brought **for the benefit of** the wife, husband, parent and children. They are the beneficiaries. **Any one of the persons entitled to sue can bring the suit, but the suit must be brought for the benefit of these four specified class of persons."**

Mohd. Habibullah v. **Seethammal**[11] is probably the only instance in which, after the 1956 amendment of the Motor Vehicles Act, a person other than those mentioned in the Fatal Accidents Act as a beneficiary was held to have not merely a right to sue but also a claim to the benefit of compensation in respect of a fatal motor accident. It may be that the married sister is the legal representative in a general sense or in the sense in which it is used in the Code of Civil Procedure[12] or the Indian Succession Act, 1925. It is difficult to understand how that fact alone could entitle her to be regarded as the beneficiary. At any rate, the judgment does not seek to explain the matter.

(e) Principles governing compensation.—Damages for personal injuries have been awarded under the Motor Vehicles Act according to general tort law princi-

8 A I R 1935 Bom 333.

9 The plaintiff's claim was rejected ultimately on other ground not relevant here

10 A I R 1947 Cal 195

11. (1966) 2 M L J 378.

12 *Dhool Chand* v *Ganpat Lal*, A I R 1957 Raj 283, wherein it was held that, according to the definition in section 2 (11) of the Code of Civil Procedure, " Legal representative " first of all means " a person who in law represents the estate of a deceased person " For the determination of the question whether a person is or is not a legal representative, it is not necessary to enquire immediately whether the deceased person left any estate, and to what extent in law a person, who is a heir of the deceased represents the estate of a deceased person, although in certain special cases some person other than the heir may represent the estate of a deceased person, as for instance, administrator or executor. See, generally, Mulla *Code of Civil Procedure*, Thirteenth edition Vol I, pp 17-19 The interpretation of the word legal representative ocurring in section 110-A (1) (*b*) in the broad sense of the Code of Civil Procedure, seems to be correct in view of the use of the same words in clause (*c*) which relates to a non-fatal accident Rules made by certain State Governments, as noted already, adopt the same definition But the Division Bench in *Mohd Habibullah* v *Seethammal*, (1966) 1 M L J 378 went further and held that such a representative was the beneficiary.

ples as before. **Ayesha Begum** v. **Veerappan**[13] and **Om Prakash** v. **N. F. & G. Insurance Co.**[14], may be cited as examples Compensation in cases of fatal accidents has been awarded according to principles laid down in **Gobald Motor Service** v. **Velusami**[15] prior to 1956 amendment of the Motor Vehicles Act. As we have already noted, that case affirms the well established principles under the Fatal Accidents Act. In **Abdul Mahomed Aga** v. **Peter Leo D'Mello**[16], which is a case under the Motor Vehicles Act, compensation has been awarded according to those principles.

V. Summary of the discussion.

Certain conclusions may now be drawn from the foregoing discussion. (i) The Motor Vehicles Act does not specify the nature of the liability. It merely uses a colourless expression "accidents". The Courts, however, have uniformly held that liability could not be imposed without fault and proof of negligence has been required (ii) The Act does not specify who a legal representative is Rules made by certain State Governments adopt the definition in the Code of Civil Procedure.[17] It is not known whether, in the absence of a person who can represent the estate of the deceased, as required, any dependent relative of the deceased is entitled to sue for compensation in respect of a fatal motor accident. Cases where there is no executor or administrator or a "legal representative" as defined in the Code of Civil Procedure are bound to give rise to some difficulty. The term "representative" in section 1-A of the Fatal Accidents Act has been construed broadly so as to avoid a contingency of that nature. (iii) The Act does not specify the persons or the kind of persons entitled to be the beneficiaries of the compensation. It is difficult to agree with a possible view that such persons are the same as the "legal representatives" entitled to sue, especially in cases where the executor or administrator, who is undoubtedly a legal representative, does not happen to be a dependant relative or even a relative at all. To award compensation to a person who is not a relative at all would go counter to the pre-existing law and policy (iv) Alternatively, it may be argued that in the absence of specified relatives, the Court can feel free to consider the case of each relative on merits and award compensation in deserving cases. If so, the question arises, what is the criterion or the limit to the number of such relatives ? Or, is there to be none at all ? (v) The Act does not state what are the principles to be applied in assessing compensation in cases of fatal motor accidents. It is well known that the principles applied in cases of personal injuries are quite different from those applied in cases of fatal accidents If the distinction is not observed and compensation is related to death itself or to all the consequences of the death which befall a relative, the rule in **Baker** v **Bolton**[18] would be obliterated by a stroke of pen of the Judge presiding (vi) Such danger is all the more certain where Judges declare that, in the absence of a specific reference to the Fatal Accidents Act in the Motor Vehicles Act, there is no warrant to apply those principles in cases arising under the latter Act.

It should be remembered that the Fatal Accidents Act was the earliest enactment providing for compensation to the family of a person killed in an accident. The amount is "proportioned to the loss resulting from such death to the parties respectively". This to a large extent mitigated the suffering of the family members, while it did not repeal the rule in **Baker** v **Bolton**[19] altogether. Whenever the Legislature thought fit to do so, it clearly stated that the Fatal Accidents Act

13. (1966) 1 M.L.J. 374.
14 A I R 1962 M P 19.
15 See note 8 on page 30.
16 A I R 1965 Bom. 21
17 See note 8 on page 30
18 See note 9 on page 30.
19 See note 9 on page 30.

it is not to apply to particular kinds of cases[20], that liability is not to depend on proof of fault but independently of it, by a categorical declaration to that effect[21] or by a denial of certain well known defences[22], that prescribed rates of compensation related to the monthly wage of the deceased apply, thereby setting an upper financial limit to liability.[23] Sometimes the Legislature imposed absolute liability in the form of a modified form of insurance, yet allowing for some defence[24], it also indicated the persons for whose benefit the amount of compensation is intended.[25] The Motor Vehicles Act is unique in that the amendments introduced as recently as 1956 do not seem to possess any of the foregoing virtues.

VI. Amendment suggested.

It is submitted that it is undesirable to leave a whole problem to the Courts. It is very likely that at times it will lead to inconsistent decisions, arbitrary awards and even some kind of a speculation on the part of the litigant public. On the other hand, the example of England seems worthy of emulation. In England, until the 29th of July, 1959, the only persons for whose benefit compensation was awarded were wife, husband, parent and child Parent includes step-parents and grand parents. Child includes a child **en vantre sa mere,** step-child, legitimated child and grandchild It came to be felt that there were cases in which certain relatives who were wholly or substantially dependent on the deceased were not able to get compensation because they were not mentioned in the Fatal Accidents Acts 1846–1908. Instances of a disabled sister, a widowed daughter-in-law and a mother-in-law were mentioned as deserving of consideration.[1] Accordingly, the Fatal Accidents Act, 1959 was passed, amending the Fatal Accidents Acts, 1846–1908. Thereby the list of dependants was extended so as to include "any person who is, or is the issue of[2], a brother, sister, uncle or aunt of the deceased person." Relationship by adoption is recognised, relationship by half-blood is equated to that by whole blood, relationship by affinity is treated as that by consanguinity; an illegitimate child is recognised as the legitimate child of his mother and the reputed father. Thus the new category includes uncles, aunts, brothers and sisters or any issue of them. All or any of these relatives can sue and recover damages for the benefit of all of them.[3]

Therefore, the only way and the best way to enable a married sister to sue and recover damages for her benefit, as was attempted to be done by the Madras High Court,[4] would be by a statutory amendment by Parliament It would be impro-

20 *e g* , section 2 (4) of the Indian Carriage by Air Act, 1934

21 *e g* , section 82-A of the Indian Railways Act, 1890

22 *e g*, section 17 of the Workmen's Compensation Act, 1923.

23 *e g* , section 4 and Schedule IV of the Workmen's Compensation Act, 1923 , section 82-A (2) of the Indian Railways Act, 1890 read with Railway Accidents (Compensation) Rules, 1950

24 *e g* , Rule 17 and Rule 20 (1), First Schedule of the Indian Carriage by Air Act, 1934

25. *e g* , dependants under the Workmen's Compensation Act, 1923 are not the same as those in the Fatal Accidents Act, 1855 Claimants under the former get statutory compensation while those under the latter get damages Persons who are dependants under the former, but not under the latter, Act are entitled to claim compensation even if the other dependants elect to claim damages under the Fatal Accidents Act *See* generally, Charlesworth, *Negligence* Second edition, pp 544-7

1 *Hansard*, House of Lords Debates, Vol 216, cols 1079-1090

2 There is no limitation on the number of generations Chapman, *Statutes on the Law of Torts*, p 43

3 Halsbury's *Statutes of England*, Second edition, (1950) vol 17, the Fatal Accidents Act, 1959 (7 & 8 Eliz. 2, c. 65) By section 1 (5) of that Act, the list of dependants under the Carriage by Air Act, 1932, is made identical This sub-section (5) is now repealed by Carriage by Air Act 1961 (9 & 10 Eliz 2, c 27), but it has not been brought into operation *See*, Street, *Torts* op cit, p 426 The law under the Act of 1932 would therefore apply until the new Act comes into operation Winfield, *Tort* Seventh edition, p 139, f n 38.

4. (1966) 2 M L J 378.

per and without parallel if the Courts of Law assume to themselves the power of extending the number of dependent relatives entitled to be beneficiaries. Similarly, it would be highly impolitic on the part of the Parliament to leave the question of who are the relatives wholly unspecified.

If the statutory provisions in sections 110 to 110-F are left as they are, it is quite possible, and we have one instance in point already, that Courts might attempt to construe the provisions literally without reference to well established principles of liability under the law of torts. That the Courts generally have not so far disregarded those principles is no guarantee that some other Courts or the same Courts in future cases may not attempt to so construe them without so much as being accused of violation of statutory provisions.

Therefore, it is submitted, it is necessary that the Government of India bring forward suitable amendments to the provisions in sections 110 to 110-F of the Motor Vehicles Act, 1939 to the following effect —

(1) That, in section 110 (1), the word "accidents" shall mean any acts or omissions which give rise to liability under the principles of the law of torts.

(2) (a) That, in section 110-B, the person or persons for whose benefit compensation is awarded shall be the same as specified in section 1-A of the Fatal Accidents Act, 1855.

(b) That, as from the date on which this amendment shall come into force, such person or persons in section 1-A of the Fatal Accidents Act, 1855 shall be:[5]

Wife or husband,

Child, including step-child, adopted child, illegitimate child and child **en ventre sa mere**, and grandchildren of like description,

parent, including step-parent, and grandparent,

brother, including that by half-blood or uterine blood,

sister, including that by half-blood or uterine blood,

aunt,

uncle,

daughter-in-law,

mother-in-law.

(3) That, in section 110-A (1) (b), the expression "legal representatives" shall have the meaning given in section 2 (11) of the Code of Civil Procedure, 1908, and shall include all or any of the relatives for whose benefit an action for damages is allowed under section 1-A of the Fatal Accidents Act, 1855.

(4) That, under section 110 (1), the Motor Accidents Claims Tribunal shall also have jurisdiction to adjudicate upon claims for compensation for damage to property caused by accidents arising out of the use of motor vehicles, whether or

5. The list of relatives given here deserves consideration for adoption as it has the virtue of increasing the number of beneficiaries under the Fatal Accidents Act, 1855, bringing about consistency in general policy considerations in Indian legislation relating to dependant's benefit. A sister and a brother are already recognised as dependants under the Workmen's Compenstation Act, 1923, the Indian Railways Act, 1890 and the Indian Carriage by Air Act, 1934 The case of a widowed daughter-in-law, a mother-in-law, uncle and aunt may call for sympathetic considesration Proof of dependence shall be necessary in each case, as before Such an increase in the number of relatives would help meet certain hard cases and would be in line with recent trends in English law.

not such accidents involve personal injury or death of a person whose property is damaged.[6]

(5) That, in section 110-B, the amount of compensation shall be assessed as under the Fatal Accidents Act, 1855.

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6 This would perhaps be in accordance with the intention of Parliament when it amended the Act in 1956. This would help avoid conflicting findings and multiplicy of proceedings in respect of the same accident Otherwise, if a personal injury should be a concomitant of an injury to property of the same person, in order to attract jurisdiction of the Tribunal, as was held in *Om Prakash* v. *N.F & G Insurance Co*, A I R 1962 M P 19, it would lead to two difficulties. One, it would only require the addition of a formal claim for personal injury, however insignifican, where the real claim is for injury to property, so as to invite jurisdiction Two, where one person sustains personal injury and another sustains injury to property, both arising out of the same accident, they have to seek two different jurisdictions. There is no reason why the present Tribunals-consisting largely of experienced District Judges, should not be vested with jurisdiction in respect of both kinds of injuries arising out of motor accidents.

APPOINTMENT OF SUPREME COURT AND HIGH COURT JUDGES FROM THE BAR AFTER ADVOCATES ACT, 1961.

By

P. G Rajagopalan

Advocate, Calicut.

The qualification required for appointment from the Bar as a Judge of the Supreme Court or the High Court is laid down in Art 124 (3) (b) or Article 217 (2) (b) of the Constitution as the case may be At the time when the Constitution came into force Advocates were enrolled before the High Court under the Bar Councils Act or under the corresponding enactment in the States

But there is a total deviation in the Advocates Act, 1961 from the Bar Councils Act and the corresponding States' enactment Now the Advocates are no longer enrolled before the High Court but they are enrolled before the State Bar Council or Bar Council of India

The clauses in the Constitution mentioned above lay down that a person shall not be qualified unless he has for at least ten years been an Advocate of a High Court. The Bar Councils Act is repealed by the Advocates Act, 1961 and as such there is no person who is enrolled as an Advocate of a High Court The fact that the persons who were enrolled as Advocates of a High Court are entitled to be enrolled before the Bar Council under the Advocates Act, 1961 shows that the intention of the legislature was to abolish the different classes of legal practitioners in India This is clear from section 29 of the Act.

The conclusion that has to be drawn from the above circumstances is that all appointments of the Supreme Court Judges and the High Court Judges from the Bar after the Advocates Act, 1961 are **ultra vires** the Constitution. This requires a retrospective amendment of the Constitution It might be argued that persons who have completed ten years before the Advocates Act, 1961 are eligible for appointment. The relevant clauses in the Constitution use the words 'has been' and as such the person must be an Advocate of a High Court at the time of appointment

LAWYER'S FEES—AN ANOMALY.

By

T S Subramanian

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The Lawyer's fee prescribed under the Rules for a suit of a small cause nature and that on the original side in certain cases is variant and discrepant so as not to conform to canons of uniformity and equity I shall illustrate this The fee prescribed for a small cause suit is at 5 per cent. subject to a minimum of Rs. 5 **ex parte** or contested On the other hand the fee allowed in original suits is "If the amount or value of the claim does not exceed Rs 5,000 at 7 per cent. subject to a minimum of Rs. 25 if of a small cause nature at Rs. 5 per cent. subject to a minimum of Rs 5, etc , when such suits are decided **ex parte,** half of the fees under the above clause" Now a decree in a S. C. suit of Rs 2,000 will entitle a party to a lawyer's fee of Rs 100 even in **ex parte** cases as per the above interpretation But an **ex parte** original suit of Rs. 2,000 will not enable him to claim the same amount of fees even if it be of a small cause nature There is no difference in the labour involved though in the original suit the party can get only a fee of Rs. 50 or less. This is not consistent or fair between parties litigating on the S. C. Side and Original side. The scale of fees in Suits **ex parte** on the S C Side and Original side must be made even and indiscrepant.

BOOK REVIEW.

MULLA. INDIAN CONTRACT ACT STUDENTS' EDITION. *8th Edn*, 1967: Price Rs 10 N. M Tripathi Private Ltd, Bombay

Mulla is a household word to students who like his books for their clear and analytical exposition which helps them to grasp the fundamentals of the subject concerned The present work possesses all these qualities No doubt it is not good to overload the student with too much case-law Nevertheless, one would expect some reference, however slight, to the recent and important case of *Indian Airlines Corporation* v *Madhuri Chowdhuri*, A I R 1965 Cal 252, where it was held that an air-ticket issued by an airline company, operating inside India, exempting the carrier from liability on account of negligence etc, of the carrier, or of the pilot or other staff, was good and the exemption clause was not hit by section 23, Contract Act, because the obligation imposed by law on common carriers in India is not founded upon contract, but on the exercise of public employment for reward.

Powerful labour unions negotiate important agreements with employers on behalf of labour and this collective bargaining takes place outside law Courts. In order that students may have a complete picture of the law of contract, they must have an inkling at least of this fast developing area of law of agreements. The so-called 'standard contract' is also a new comer in this line, in the sense that the injustice involved in this type of contract was not recognised and criticised till recently As has been aptly remarked, one has a choice of various rail, shipping or air companies to travel but their conditions of carriage are identical.

The significance of the "ticket cases", like *Henderson* v *Stevenson*, *Thompson* v *L M & S R Co* will be lost on the student unless the spectrum of the concept of the standard contract is allowed to play on them A fleeting reference to this concept can be very illuminating indeed

At page 135 the learned author has supported the line of cases such as *Radha Krishna Das* v *Municipal Board of Benares*; *Municipal Corporation of Bombay* v *Secretary of State*, which hold that section 65 does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal Corporation and goods are supplied or the work done in pursuance of the contract, but the contract is required by the Act under which the Corporation is constituted to be executed in a particular form (for example, to be signed by two councillors), and it is not so executed It cannot be said that such Acts prohibit this type of contract and so no question of the contract being unlawful under section 23 can arise

Section 1, third para says that "Nothing herein contained shall affect the provisions of any statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act." The words "not inconsistent with the provisions of this Act," govern also "Act or Regulation" since there is a comma after the word "contract". If an Act is inconsistent with the Contract Act, it is not saved. Section 10, para 2 says that nothing in the Act shall affect any law by which any contract is required to be in writing If the law is concerned with something other than writing, for example, that a contract by a Municipality should be signed by two councillors, such a law goes under when it comes into conflict with the Contract Act. Both under sections 12 and 10 therefore a contract with a municipality which is not signed by two councillors as required by the relevant municipal Act, would be a valid contract, it is submitted.

At page 256 there is a reference to "48 Bom. 20" Obviously I L R. 48 Bom. is meant. At page 176, reference is made to 50 A Trav-Coch 66 The reference is perhaps to A.I R 1950 Travancore-Cochin Citations to I L R and A I R. should be clearly distinguished to avoid confusion to the students. A chart of the old English Reports is also very desirable.

K. Venkoba Rao.

EMERGENCY AND LAW WITH SPECIAL REFERENCE TO INDIA By *Sri N C Chatterjee M P*, and *Sri P Parameswara Rao* Published by the Asia Publishing House, Bombay-1 1966. 132 pages Price Rs 15.

The security of a State is a *sine qua non* for the true progress of its citizens in all directions Its maintenance becomes, therefore, a matter of utmost concern with every Government A period of emergency calls for special measures to meet it In democratic countries which believe in civil liberties it becomes a dilemma to reconcile the conflicting pulls of individual liberty and State security In every democratic constitution, written or unwritten and developed by conventions, provisions exist to cope with situations of emergency It is true that a war cannot be conducted on the principles of the Sermon on the Mount. Equally it cannot be carried on according to the principles of the Magna Carta During a period of emergency the Executive is necessarily armed with wide and drastic powers But power tends to become all-embracing and to remove from its path all impediments and obstacles The path of wisdom lies in circumscribing its arbitrary exercise How it has been sought to be achieved in the United Kingdom, the United States, Australia, etc , and in India form the subject of study in this book In other countries it is the emergency arising by reason of external aggression that is contemplated Our Constitution specifically provides for three types of emergencies, namely, national emergency, State emergency and financial emergency. Again, unlike in the United States of America where the Supreme Court despite its being prepared to take notice of emergency conditions in questions involving individual rights would not allow the total suspension or flagrant violation of the fundamental rights guaranteed by the Constitution, under Article 358 of our Constitution while a Proclamation of emergency is in operation the fetters imposed on the State in regard to the rights guaranteed by Article 19 drop for the duration, and under Article 359 the President may by order declare that the right to move any Court for the enforcement of such of the fundamental rights as may be specified in his order shall remain suspended for such period as may be specified in the order. Whether there is need for the retention of these sweeping and arbitrary powers in their present form and how they have to be controlled if they are not to operate oppressively are discussed in the light of the operation of the emergency provisions in the United States and the United Kingdom In the latter country effective public opinion forms the bulwark against the misuse of powers and in the United States the Supreme Court functions as the watch-dog of the Constitution But in India, neither of these safeguards is effectively present. The book under review constitutes a brilliant study of the problems arising out of the operation of the emergency provisions of the Constitution and makes a powerful plea for the effective control of abuses in the exercise of the provisions so that life in this country for the citizen will be worth living

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THE LAW OF CONSTITUTIONAL WRITS A Study by *Bhawani Sankar Chowdhury* with a Foreword by *Sri P C Sen* Published by the Eastern Law House Private Ltd , Calcutta 1966. 229 pages. Price Rs 15.

Individual liberty and social control are not necessarily antithetic though they seem to be always at grips each trying to contain the other. While the guaranteed rights are set out in Part III and made justiciable the aims and policies of the Government are set out in Part IV and made non-justiciable Whether the individual rights and liberties enunciated in Part III should circumscribe the social objectives set out in Part IV or be circumscribed by them is a fascinating subject for discussion According to the author the directive principles are in reality more fundamental than the rights set out in Part III and circumscribe them instead of being circumscribed by them (Preface, p vii) They constitute the " policy of the law ", *i e* , " wisdom of the law " signifying what conduces to the public good (p 95), and so no steps taken in the Court should be opposed to public policy as enacted in Part IV (p 93). Though plausible and attractive, the argument does not allow for the fact that Court take note of public policy only in the absence of statutory prescription on any

matter and Part IV of the Constitution expressly provides that the provisions in that part are not justiciable That is why in *Champakam Durairajan's Case*, (1951) S C J. 313, the Supreme Court observed that " the directive principles of State Policy have to conform to and run as subsidiary to the chapter on Fundamental Rights ", and again in *M H Quareshi* v *State of Bihar*, (1958) S C J. 975 that " the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Chapter III will be a mere rope of sand ".

A further question is as to the precise scope of the provisions in Articles 32 and 226 to issue writs Adverting to the words " whichever may be appropriate " after the names of the five writs in Article 32 the author expresses the view that the Supreme Court has to take the law of the English writs as it stood in England, that the Court cannot change that law at all but has only to decide as to the appropriateness of the writ and that the declaratory order made by the Court in *Kochunni's case*, (1959) S C J. 858, was in violation of the principles under which prerogative writs are issued in England This is rendering scant justice to the language of the Article which gives power to the Supreme Court to issue directions or orders or writs Such writs are inclusive of the five named well-known writs of English law And the particular direction, order or writ to be issued in a case should be appropriate to the enforcement of the particular right whose infringement is alleged. The central idea is that by whatever nomenclature the remedy may be called it should be appropriate to the case A proper construction of Article 32 will be that in granting the remedy the Supreme Court will follow the broad and fundamental principles underlying the issue of such writs in England but that, where the scope of any of the writs was restricted or cramped due to the accidents of its history or procedural technicalities attending its evolution, the Supreme Court will ignore such history or technicalities and will issue directions or orders untrammelled by them The correct perspective is that given by the Supreme Court in *Bassappa* v *Nagappa*, 1954 S C J 695 " The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing orders, writs or directions, including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, *prohibition* and *certiorari* as may be considered necessary for the enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well In view of the express provisions of our Constitution we need not look back to the early history or the procedural technicalities of these writs in English law nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges " The Supreme Court also added that " the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in Engilsh law " may serve as guide lines In the felicitous language of the author " the impatience is against glow-worms, the eternal beckon of the stars is not disregarded " While this is so, at the same time, it is also to be noted that there is nothing to limit the powers of the Supreme Court to those circumstances only in which the English Courts could grant relief.

An interesting suggestion made by the author to relieve congestion in the High Courts in regard to writ applications is to divert some of the work to the District Courts as envisaged in Article 32 (3) The author has stated that sections 45 to 51 forming Chapter VIII of the Specific Relief Act, 1877, have not been repealed and on that assumption has made certain observations The Specific Relief Act of 1877 has been replaced by the Specific Relief Act of 1963 and the sections referred to exist no longer The book is on the whole stimulating and instructive revealing an original approach and acute analysis.

OUTLINES OF INDIAN LEGAL HISTORY. *By M P Jain* with a Foreword by *Alan Gledhill*, Second Edition. 1966, Pages 746 Price Rs. 30 (Published by N M Tripathi Private Ltd, Bombay-2)

Not many books exist on this subject written by Indian authors Sri Jain's book is a pioneering attempt in a field which Indian authors have not ventured to explore Pollock, Maitland, Holdsworth, etc are some of the great jurists whose works constitute veritable treasure houses in regard to the subject in England and are monuments of research and learning In India, books by Cowell, Fawcett, Rankin and others cover only particular aspects or epochs in Indian legal history. Without legal history there cannot be depth to legal knowledge It is a great pity that till recently the subject did not receive adequate attention

Even the present work is fragmentary in the sense that it covers only the developments of legal systems in this country from the time when the East India Company set up its factory at Surat in 1612 down to the labours of the present Law Commission and the enactment by Parliament of the British Statutes (Application to India) Repeal Act, 1960 (LVII of 1960). The book is laid in 26 chapters. Separate chapters are devoted to the administration of justice in Calcutta, in Madras, and in Bombay and to the Supreme Courts in those towns Chapter XIX deals with the High Courts and Chapter XX with appeals to the Judicial Committee of the Privy Council To students and votaries of law in this State, Chapter III dealing with Administration of Justice in Madras. 1639-1726, and Chapter IX dealing with the Supreme Court in Madras till 1861 will have a special appeal. It is fascinating to read that judicial administration in the country started as an extremely elementary and executive-ridden judicial system, in the Presidency Towns, that a major break-through in the situation occurred only after 150 years of British rule when a Supreme Court was established in Calcutta in 1754, that the High Court is the precursor of the modern system of law and justice, and that the judicial institutions at the present time constitute a fine legacy of the British association with India As regards the legal systems it is pointed out that conscious efforts to develop a coherent body of law commenced only from 1833, that the four Law Commissions appointed thereafter at intervals had made significant contributions and that the advent of Independence has led to considerable legislation in the domain of private law in particular which till then had been regarded as a practically forbidden field The chapter on the Development of Criminal Law (Chapter XXI) is instructive Before the enactment of the Penal Code in 1860 Muslim Criminal Law was being applied To minds trained in western systems of jurisprudence many parts of that law were unscientific and harsh. The doctrines of haram and hadd, the division of crimes into crimes against God and crimes against humanity, etc were felt to be crude and inconsistent with modern social life. A brief chapter on law reporting in India is also included The author refers to the evils of multiplicity of private reports and lack of selectivity in the reporting of cases He remarks that law reporting in England is very much better and much less wasteful than it is in India, but he has no remedies to offer beyond stating that "perhaps a representative body of lawyers might be able to do something to improve the quality of law reporting and regulate the vast mass of case law that is reported in India today"

To write a book on legal history is not an easy task since the materials have to be dug from the past and they are generally hard to digest and present in the correct perspective Sri Jain has taken great pains in gathering a large volume of matter spread over a period of 350 years and presenting the same in a relatively short compass and in a manner not too difficult to assimilate by the reader. Sri Jain's book constitutes a welcome publication

THE LAW RELATING TO FOREIGNERS IN INDIA AND THE CITIZENSHIP LAWS OF INDIA AND PAKISTAN. *By Mazhar Husain* Revised by *R P Saxena*, Fourth Edition, 1967, Pages 404 Price Rs 15 (Published by Eastern Book Company, Lucknow and Delhi)

The distinction between a foreigner and citizen is vital and highly important. The latter owes allegiance to the State, is entitled to its protection, is governed by its laws and is subject to various obligations The foreigner on the other hand owes no such allegiance and is an outsider whose presence in the country can only be by sufferance While some rights may be enjoyed by a person whether citizen or not, others such as those mentioned in Articles 15, 16, 19 etc , of the Constitution are available only to the citizens. Who are 'foreigners' and what powers may be exercised by the Central Government in respect of the entry of foreigners, their presence therein, and their departure therefrom are dealt with in the Foreigners Act, 1946 As regards citizens the Constitution had made only tentative provisions in Articles 5 to 11 The Citizenship Act of 1955 deals specifically with the subject.

The book under review is essentially a commentary on the Foreigners Act (XXXI of 1946) and the Citizenship Act (LVII of 1955) It brings together a mass of dispersed material found in various Orders, Notifications and Rules relating to the subject and endeavours to present a complete picture The text of the Naturalisation and Citizenship Acts of Pakistan are given in the Appendix adding to the utility of the work It is not clear however why the amendment made by the Citizenship (Amendment) Act, 1957, inserting in the First Schedule to the Citizenship Act, 1955 after Entry 8 under the heading A, the Entries 9 Ghana 10 Federation of Malaya, 11 Singapore have not been incorporated on page 292

The general principles relating to the subject are stated succinctly and clearly referring to the leading decisions The case-law has been brought up-to-date. Concepts of citizenship, nationality, domicile, etc , are explained lucidly In writing the book the author has explored an unbeaten track His work is a useful contribution to the subject.

THE LAW OF PARLIAMENTARY PRIVILEGES IN INDIA *By V G Ramachandran* (Published by Eastern Book Co , Lucknow) 1966, Pages 731 Price, Rs 45 .

This is a book in the grand style Dedication to the Rashtrapati Dr S Radhakrishnan and to the Democratic Republic of India, Parliament and the State Legislatures and in Memory of Sri S Satyamurthy; Benediction by Dr Radhakrishnan; Tribute to Sri Satyamurthy by the President of the Congress, Sri Kamaraj, Foreword by the Chief Justice of India (Subba Rao, C J), Introduction by Sri Anantasayanam Ayyangar, Governor of Bihar and Ex-Speaker of the Lok Sabha, Preface by Sri G S Pathak, Law Minister of India , the Author's Preface and occasional use of expressions like "Quoth he" and "Says he"—it is all rather overwhelming

In the U S Constitution there is strict separation of powers between the Executive, the Legislature and the Judiciary leading to the Supreme Court becoming the guardian of the Constitution and enabling it to claim that the Constitution is the Supreme Law of the land and the Constitution is what the Supreme Court says it is In England by reason of Parliament being omnipotent there is no room for any conflict of powers between Parliament and the Judiciary. In India the Constitution has adopted a third course and each organ of State functions within the limits of the powers assigned to it being within such sphere independent of the rest The Constitution has also guaranteed in Part III the liberties of the individual enumerated therein and made them sacrosanct and immune from alteration except to the extent and in the manner set out in that Chapter itself. The Supreme Court is expressly charged with the duty of affording protection against the violation of those rights through the writ procedure. It is also declared that no law passed prior to the Constitution would be valid to the extent to which it trenches

upon such fundamental rights Thus every law to be valid has to satisfy two requirements, namely, (1) it should be within the competency of the concerned legislature, and (2) it should not trench on the rights in Part III. Parliament is said to be not only a legislative organ but also a grand inquest of the nation It has legislative, executive and judicial functions For successfully discharging its duties it possesses various powers, immunities and privileges In England these have been evolved over a course of several centuries These constitute the *Lex Parliamenti* and have become a part of the law of the land In India, the Constitution has provided that the powers, immunities and privileges of each House other than those specifically enumerated in Articles 105 and 194 shall be defined by Parliament by law, and until so defined shall be the same as those of the House of Commons in England at the time of the commencement of the Constitution Though codification of privileges is contemplated no code has yet been enacted In the circumstances interesting questions arise as to whether the Courts can consider the existence of a privilege and whether the privileges, are subject to the fundamental rights in Part III The question of Parliament's privileges leaped into great prominence recently in connection with a writ petition filed by one Keshav Singh who was found by the U P Legislature to be in contempt of the House by reason of a statement made by him which in its opinion constituted a breach of its privileges and was punished with imprisonment for a week The question thereupon arose whether the privilege of the House to commit a person for contempt could be exercised inconsistently with his fundamental rights While the Supreme Court had in *Keshavaram Reddy's case*, A I.R 1954 S C. 636, held that Article 194 (3) is subject to the fundamental rights, in *Sharma's case*, (1959) S C J 925 · A I R 1959 S C 395, it had taken the view that Article 194 (3) except when law was made, was not made subject to Article 19 (1) Recently, in Special Reference No 1 of 1964 , *Under Article* 143 *of the Constitution of India*, In re, (1965) 1 S C J 847 . A I R 1965 S C 745, the Supreme Court has held that Article 194 (3) is subject to the fundamental right in Article 21 To hold that Article 194 (3) is subject to fundamental rights only when law is made but not otherwise would be to ignore the principle implicit in Article 13 and will operate as an incentive not to enact any law of privileges at all.

A book on Parliamentary privileges both in this country and elsewhere will be highly helpful not only to the legislators but also to the laymen The book under review constitutes a useful venture by the author He has started with the definition of privilege, its nature and contents He has traced the origin of privilege and dealt with its evolution historically in England He has indicated its growth in this country both in the Union and State Legislatures since freedom was attained. He has dealt with the persons entitled to privileges and the categories of such privileges The procedure relating to the bringing to the notice of the House of any breach of privilege, the appointment of a Committee to investigate the same, and the procedure therefor are all set out carefully The author admits that " it was not possible just now to treat the subject of privileges on a text-book pattern " (Preface page liii). It is to be hoped that in future editions the matter could be rearranged more systematically and the book made to serve both as a reference book and as a text book In a top class book there should be no printing or other errors of the kinds noted here. On pages xliii and lii *beholdened* should be beholden, on page xliv *Dunman* should be Denman, on page xlix *humbe* should be humble, and *Kaka* should be Koka On Contents page iii, " forged *for* fabricated " should be forged or fabricated" On page xli Table of Cases, *Ramal* should be Ramiah On page 33 *obstrust* should be obstruct On page xxvi of the Table of Cases *M S M Sharma* v *Shri Krishna*[1], A.I.R 1960 S.C 1186, is set as occurring on page 101, but no such reference is found on that page

The book under review is the first of its kind in India Prodigious effort is a hall-mark of the Author's books The present book is no exception The Author has made judicious use of the Lok Sabha Library literature and other relevant material. He has considered all the important decisions, Indian and foreign.

His approach to the subject is objective His advocacy of a just balance between Parliamentary privileges and fundamental rights is welcome The Author deserves high credit for bringing out this treatise

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NATURAL JUSTICE OR FUNDAMENTAL PRINCIPLES OF JUDICIAL PROCEDURE *By Suranjan Chakraverti*, Second Edition, 1966 (Published by Eastern Book Company Lucknow and Delhi) Pages 307, Price Rs 17-50

Though the term "natural justice" has been employed in different senses as signifying "natural law", "universal law," "eternal law", "the laws of God", "equity", etc , it is used commonly to refer to certain principles in relation to judicial procedure and quasi-judicial procedure, a failure to conform to which is considered tantamount to failure of justice Instances of such principles are that a person shall not be a judge in his own cause, that a person shall not be condemned unheard, that every person shall be given an opportunity to present his case, etc Conformity to such rules has become all the more necessary since large areas of quasi-judicial and discretionary powers fall to be exercised at the present time by various types of agencies and tribunals, domestic and others Further, many of the executive heads on whom the burden of administration is cast in a Welfare State are not, as is clear from the qualifications prescribed for them, conversant with the principles they should observe in carrying out their day-to-day tasks and deciding questions affecting the rights of citizens A book stating and expounding such principles in a short compass is bound to be immensely helpful The present work attempts to meet this requirement The subject is arranged under 10 Chapters The first chapter gives a general introduction The second states the requirements of Natural Justice and the third deals with Natural Justice *vis-a-vis* the Legislatures The fourth Chapter relates to Administration of Justice and the fifth to Tribunals and Domestic Tribunals Chapter VII covers the question of Disqualification of Judges and Chapter VIII the principle of *audi alteram partem* Chapter IX is devoted to a number of miscellaneous matters and Chapter X to Mofussil Lawyers and Natural Justice The subject-matter of each chapter is presented mostly in the form of quotations from standard books and authors and from judicial decisions. The book will benefit lawyers and judges

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PRACTICE AND PROCEDURE OF THE SUPREME COURT OF INDIA · *By Guru Datta* and *B R Agarwala.* (Published by Metropolitan Book Co , (P), Ltd , Delhi-6), First Edition, 1967 Pages 159 Price Rs 22-50

The Supreme Court Rules, 1966 govern the procedure to be followed before that Court These Rules are simpler and more effective than what went before. Nevertheless it is difficult for the litigant as well as the lawyer to be familiar with the practice obtaining in the different jurisdictions of the Supreme Court—original, appellate, advisory and special as in regard to writs, taxation matters, industrial disputes, etc The observations made by the Supreme Court from time to time during the last sixteen years bearing on practice, powers and procedure lie dispersed and have to be culled together from decisions dealing essentially with questions of substantive law This task, the authors have undertaken in the book under review. The book is divided into nine Chapters Chapters I and II cover the practice and procedure relevant to the exercise of original jurisdiction. Chapter III concerns itself, with appellate jurisdiction and Chapter IV with appeals by Special Leave. Chapter V is devoted to Income-tax Appeals and Chapter VI with topics like Review by the Supreme Court and the binding character of Supreme Court decisions. Chapter VII deals with civil appellate jurisdiction and criminal appeals. Chapter VIII sets out miscellaneous provisions relating to affidavits, consolidation of appeals, costs, etc This chapter deals with the taxation of costs A short historical account of the Judiciary in India is given in the Introductory Chapter. The Supreme Court Rules are given in Appendix A In Appendix B relevant provisions from the Limitation Act, 1963, Orders of the Civil Procedure Code and the Supreme Court

(Decrees and Orders) Enforcement Order, 1954 are set out Appendix C contains Forms and Precedents and Appendix D deals with the time prescribed under the Rules for taking various steps and the Instructions and Clarification about the Supreme Court Rules, 1966 The book presents thus in a compendious form the practice and procedure of the Supreme Court developed and evolved over the years The book is a really useful publication by authors highly competent to write on the subject by reason of considerable experience and intimate association with the practice and procedure of the Supreme Court

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THE LAW RELATING TO BRIBERY AND CORRUPTION: *By R K Soonavala* (Published by N M Tripathi Private Ltd, Bombay) with a Foreword by Justice Shelat, 1964 Pages 600 Price Rs 25

Good Government depends on the existence of a hierarchy of honest and incorruptible public servants Unfortunately in this country bribery and corruption among public servants is said to be on the increase The scope for corruption had become large due to war conditions It has been still further widened with the application of controls in various fields of economic activities by commitment of the country to vast and ambitious schemes of development involving huge sums of money and the concentration of financial and other powers in the hands of a few top officers depending for their exercise on an army of subordinate officers, the introduction of the "permit system" in various matters, etc Not many could resist the temptation to accept illegal gratification From a few sections, sections 161 to 165 of the Penal Code, the changing times have necessitated legislation like the Prevention of Corruption Act, 1947, and the Criminal Law (Amendment) Act, 1952 It has come to be realised that legislation has not been able to combat the evil much less to control it As Justice Shelat observes in his Foreword "the problem is no longer one which can be resolved by mere legislation and requires a solemn effort to make an assault on the evil from different fronts"—legislative, sociological, economic and political The failure to solve the problem may also be due to lack of earnestness and sincerity in the attempts to wipe it off, to too much red-tape in the matter of bringing home guilt and to a misplaced, sense of compassion and sympathy of a large section of the public, in such matters One thing is however clear, that a serious tackling of the problem cannot be put off much longer The author has endeavoured to present the problem in an integrated form in the book under review by bringing together the provisions concerning corruption in different statutes and giving in the appendices parallel statutes dealing with the problem in other countries.

The book is divided into eight parts Part I gives the text of the Prevention of Corruption Act with a full commentary. Part II deals with offences by public servants as laid down in the Penal Code, Part III with the law relating to criminal conspiracy for taking bribe, Part IV with the offence of attempt to take bribe and Part V with the offence of abetment in the taking of bribe Part VI is devoted to the Criminal Law (Amendment) Act, 1952 Part VII deals with practice and procedure and Part VIII with model forms of depositions The book discusses topics like the duties, functions and privileges of Special Judges, Public Prosecutors handling bribery cases and Police Officers investigating such cases The treatment is lucid and analytical Full use has been made of case law The book will be useful to lawyers, members of the Judiciary and police officials.

POWERS AND JURISDICTIONS OF CRIMINAL COURTS AND FUNDAMENTALS OF CRIMINAL TRIALS by *Anjani Nandan Gaur* (Published by Eastern Book Company, Lucknow and Delhi) 1966 901 pages Price Rs 35

The book concerns itself mainly with topics relating to Sessions and other trials in a hierarchy of criminal Courts and the legal problems and controversies frequently arising at such trials It is divided into seven parts, each part being sub-divided into chapters with many of the latter subjected to a further scientific classification Each chapter carries a synopsis of the topics discussed To a busy legal practitioner useful assistance is afforded in particular by the four chapters of Part V (Charge indicative of offence), the five chapters of Part VI (Documents receivable or admissible in criminal trials) and the five chapters of Part VII (Appellate, revisional and other jurisdictions) The exposition takes the form of a statement of the principles laid down in decisions arranged under paragraph headings and case law down to 1966 has been taken into consideration It is not clear why in considering the powers and jurisdictions of criminal Courts there is only a causal reference to the Supreme Court's powers. The scope of its appellate jurisdiction under Article 134 of the Constitution is not noticed in any detail and its powers to transfer criminal cases from one High Court to another hardly comes for mention A reference to these subjects would make the book more complete.

THE LAW RELATING TO ARMS, AMMUNITIONS AND EXPLOSIVES By *A N Gaur* (Published by the Eastern Book Company, Lucknow and Delhi) 1966 592 pages: Price Rs. 20.

The law relating to arms, ammunition and explosives is an important branch of the penal law of any country. During the period of the British rule of India every Indian was suspect as a potentially disloyal person and a threat to British hegemony of India This distrust was manifest in the galling and humiliating restrictions subject to which alone an Indian may possess fire-arms The curbs and restrictions meant in effect a disarming of the entire nation The advent of Independence naturally called for a thorough reorientation of policy and practice But human nature being what it is, a certain measure of control of fire-arms and their use will at all times be necessary and inevitable in the interest of the State for the maintenance of law and order in general and for ensuring public peace, security and tranquillity. The British rulers had enacted the Indian Arms Act of 1878 and it has been replaced by the Arms Act of 1959 which has been in operation from 1st October, 1962. The book under review gives an account of the statutory provisions and rules and regulations relating to the subject The book is laid in five parts Part I deals with sundry matters like some aspects in relation to five-arms, application of the principles of the Evidence Act and other laws etc Part II sets out the text of the Arms Act of 1878 with brief comments on each section, and Part III covers the Arms Act of 1959 in a like manner Part IV gives the Arms Rules, 1962. Part V is devoted to an exposition of the law relating to explosives with the Indian Explosives Act, 1884 and the Explosive Substances Act, 1908, as the bases To those interested in Arms and Explosives as well as to the Police and the Authorities the book is bound to be helpful.

A. P MATHUR'S COMMENTARIES ON PREVENTION OF FOOD ADULTERATION ACT, 1954: Fifth Edition, revised by *J N Srivatsava* 1966 (Published by Eastern Book Company, Lucknow and Delhi) 458 pages. Price Rs 17-50

The food adulterator is a public enemy And he continues to thrive Measures have been taken from time to time to eradicate the evil and there have been a number of enactments Food adulteration is included in the concurrent list of the constitution enabling the Central Government to enact all-India legislation on the subject The Prevention of Food Adulteration Act, 1954—a short Act with but 25 sections—has replaced the food adulteration laws of the States wherever they had existed earlier and is applicable to the whole country. The book under review sets out the text of the Act and gives a section by section commentary It gives also the Central Rules for the Prevention of Food Adulteration, 1955; as well as, the Rules framed by the

States under the Act—Bihar, 1958 ; Himachal Pradesh, 1958 ; Madhya Pradesh, 1962, Mysore, 1960 and Madras, 1965 The comments are lucid and penetrating. The author has drawn attention to lacunae in the Act and his comments display a sense of humour At page 38 he remarks . "The terms 'natural', 'substance' and 'quality' (in the definition of adulteration in section 2 clause (1) (*a*)) have nowhere been defined in the Act or the rules made thereunder'. . . In the absence of a definite indication in the Act serious difficulties may arise because the term 'quality' may be defined in various ways by various persons according to their taste and depending to a large extent upon individual idiosyncracies" At page 39, he refers again to the absence of any definition of the words "to his prejudice" in the same provision, and quoting Halsbury—"There may not be pecuniary prejudice, nor there be any prejudice arising from the consumption of unwholesome food, nor even there be any prejudice or actual damage or loss to the actual purchaser But there is prejudice whenever there is sale of an article in such a state that an ordinary unskilled person would have been prejudiced if he had received in response to his demand for an article of that denomination"—he comments "the definition or explanation gives by him (Halsbury) is something very circular where caught up once, one goes on moving round and round without ever reaching anywhere". The book deals with the subject in a helpful manner. It has been kept up-todate in regard to case law by the revising editor It will be a welcome publication to lawyers, Health Authorities and others alike.

LAW RELATING TO CONTROLS IN INDIA, in two volumes, by *Madhusudan Lal Chandak*, Volume II, 1966 (Published by Wadhwa & Co., Indore). Price Rs. 20, for the second volume and Rs 36 for both volumes

While the first volume gives commentaries on the Essential Commodities Act, 1955, Industries (Development & Regulation) Act, 1951, the Defence of India Rules, 1962 and the All India Control Orders, the present volume contains 171 Control Orders covering about 700 pages. The work is one involving great patience and effort The author deserves credit for making available in a handy volume material which previously one cannot get at easily and without a laborious search requiring a wading through of a mass of literature

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FUNDAMENTALS OF RENT CONTROL LEGISLATION IN INDIA WITH RENT CONTROL ACTS OF ALL STATES by *R. C Kachatta* (Published by the Lawyers Home, Indore-3), with a Foreword by Justice *H R Krishnan*. 1966 . Price Rs. 25.

Rent Control Legislation in India made its appearance as early as 1918 due to the conditions produced by the world war I. The Bombay Rent (War Restriction) Act, 1918, the Bombay Rent (War Restriction No. 2) Act, 1918 and the Calcutta Rent Control Act, 1920 were born in that wise intended to be temporary measures The conditions arising out of the Second World War worsened the plight of tenants in big cities Frequent evictions and rack-renting were prevalent on a large scale Industrialisation of big cities led to large influx of people from the rural areas attracted by employment opportunities. The accommodation problem became very acute and rent control legislation had to be resorted to in every State in addition to large scale house-building programmes undertaken by both Government and private bodies The object of rent control legislation is twofold—to prevent unreasonable eviction and to control rent. The author has, in the book under review brought together the several State enactments on the subject as well as the English Rent Act and other allied Indian Acts. That is one feature of the book The other and a more useful feature is the topic-wise discussion and exposition of the law in force relating to rent control in the different States in the form of a comparative and consolidated study The points made by the author are illustrated by profuse citation of appropriate decisions of the Supreme Court and of all the High Courts The commentaries and compilations are sure to prove helpful to the legal profession and the judiciary. The author's suggestion in the Preface that it would be desirable if the Centre legislates on the subject of Eviction

and Rent Control leaving it to the option of the State Legislatures to make any necessary amendments to suit local conditions and circumstances merits consideration.

THE MINIMUM WAGES ACT, 1948 : by *A W Kanmadikar* (Published by Wadhwo and Company, Indore-2) 1964 Price Rs 21.

Problems relating to labour are naturally of great importance in a welfare State. In all democratic welfare States great inroad has been made by legislation cutting into the common law principle that wage bargain is a contract between individual employers and individual employees The policy of *laissez faire* has been jettisoned and collective bargaining has come to be accepted The fixation of minimum wages becomes a matter of special significance in a country like ours where workers are dispersed over numerous small establishments in a relatively unorganised industrial sector. The Minimum Wages Act, 1948, was one of the earliest enactments in a comprehensive labour code formulated after Independence was achieved In this book of about 525 pages are set out succinctly the objects underlying the Act and the events that led to legislation on minimum wages both in this country and in England. The book furnishes information on wage fixing machinery and brings out clearly the meaning and the nice shades of difference between concepts like living wage, minimum wage and fair wage; and the relation between the Minimum Wages Act and other labour laws The questions relating to each provision are dealt with on the basis of the decided cases The author has discussed also the impact upon the Act of the provisions of the Constitution like those relating to the fundamental principles, directive principles of State policy, and delegated legislation The author is a person specially competent to write on the subject having had rich experience as a judge of the Labour Court, as Commissioner for Workmen's Compensation and Authority under the Minimum Wages Act and dealt with cases connected with labour and capital The book will be very useful to students of law and to all persons interested in or concerned with problems relating to labour

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BUILDING AND ENGINEERING CONTRACTS : Formation, Management and Discharge, by *B. D Virmani*, 1966. (Published by the Engineering Law Publications of India, Lucknow) Price Rs 15 (Rs 17 by post)

This book is designed to fulfil the need of construction industry Building operations call for good understanding between a number of persons—employer, contractor, engineer, architect, specialists and sub-contractors To achieve maximal efficiency mere knowledge of the technicalities and methods of construction alone will not suffice There should be awareness of the entwined relationships, contract procedures and practices, and a sound grasp of business principles relating to the formation, management and discharge of contracts The book under review covers all aspects from the pre-contract stage to final completion The inclusion of a section devoted to the principles of discharge of contracts is bound to be helpful. The book will be of use to engineers, architects, builders and contractors and others.

METHOD OF COMPARING THUMB IMPRESSIONS by *H. A. Hardless* (Published by the Author, Chunar, U.P.). Price Rs. 3

Section 45 of the Evidence Act makes expert evidence admissible. Its worth depends more on the reasons given than on the qualifications of the expert This is because the science of finger-print identification is based on a deduction from facts according to the law of probabilities of data found and seen in the impressions to be compared. In this booklet of about 20 pages the author who is a document-expert with considerable experience gives an interesting exposition of the method of comparing thumb-impressions which will appeal even to laymen

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THE BENGAL FINANCE (SALES TAX) ACT, 1941 by *J. N. Sanyal*, 3rd Edition, 1966 (Published by Sarkar & Company, Calcutta-9) 185 pages Price Rs. 6.

The Bengal Finance (Sales Tax) Act, 1941 does not apply to the commodities to which the West Bengal Sales Tax Act, 1954 applies The principal point about the former Act is that when a dealer's sales exceed the taxable quantum—Rs 10,000 for importers, producers and manufacturers, and Rs. 50,000 for others, in any accounting year followed by the dealer he becomes liable to pay tax after the expiry of two months from the date on which his total sales exceed the taxable quantum The more complicated sections of the Act are annotated by the author in the light of the decided cases The Bengal Sales Tax Rules, 1941 are also given The book under review has been written mainly for a layman and will be useful to him.

INDIAN COMPANY LAW by *Avtar Singh*, (Published by Eastern Book Company, Lucknow and Delhi), 393 pages. Price Rs 12-50.

In an expanding era of trade and commerce company law is receiving constant attention and revision to meet the increasingly fresh situations and problems thrown up The Indian Companies Act, 1956 with its subsequent amendments is a lengthy and complicated piece of legislation In this book the author has endeavoured to present company law in the form of basic and elementary principles The enunciations are illustrated with Indian case material though English cases are also relied upon to illustrate underlying principles The author's exposition of the law is lucid and interesting and easy to follow The book will appeal particularly to students besides others

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THE INDIAN SUCCESSION ACT by *P L Paruck*, 5th edition by *J L Joshi*, 1966 (Published by N M Tripathi Private Ltd , Bombay) Price Rs 30

In what shape a reformed Indian Succession Act will emerge after its examination by the Law Commission is not clear The Act of 1925 being a consolidating Act all the sections of the earlier Act of 1865 had been re-enacted verbatim and in that sense it could claim to have been on the statute book for more than a century. Though its application was restricted to communities other than Hindus, Muslims, Sikhs, Jains and Buddhists it is still the territorial law of intestate and testamentary succession and its rules both as substantive law and rules of procedure are exclusive. Mr. Paruck's commentaries on the provisions of the Act had gathered much prestige and were popular with the legal profession The underlying principles had been expounded in a clear and lucid style. There are however some statements liable to criticism found in the book Thus on page 6, under the caption "Rights of convert's relations to the property of his Hindu relations" citing *John Jiban* v *Abinash*, I L R (1939) 2 Cal 12, it is stated." a Christian became a Mahomedan and it was held that the succession to his property was governed by Mahomedan law". It is not clear how the statement is relevant to the paragraph heading At page 78, it is stated that a member of a Mitakshara family after giving notice of partition to the other members can bequeath his share in the family property, and this is now given statutory effect by section 30 of the Hindu Succession Act The statement is not happy There is nothing in section 30 requiring such notice to be given by a coparcener Notwithstanding such occasional statements the book constitutes a trustworthy guide on the Indian Succession Act The present edition has been revised by an experienced editor in the light of the decisions rendered till the end of 1965. The book will be a useful addition to every lawyer's library

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THE INDIAN CONTRACT ACT, 1872, in two volumes, *by Atul Chandra Patra* Volume I, 1966 (Published by the Asia Publishing House) Price Rs 40

The volume under review covers sections 1 to 67 . It is stated that sections 68 to 238 would be covered by volume II which would include also 3 appendices giving respectively the proposals made by the Law Commission in their Thirteenth Report for the amendment of the Indian Contract Act ; the text of the Sale o Goods Act, 1930 ; and the text of the Specific Relief Act, 1963 The book aim at presenting a critical and analytical study of the provisions of the Indian Contrac

Act explaining all the important concepts of that law The general principles are extracted from the decided cases and English decisions which form the bases of such general principles are also cited It would have been useful having regard to modern conditions of life, if the author had discussed such questions as to where a contract is made and where a contract is made by instant communication like telephone, telex etc , *fully* particularly because the former question is not expressly dealt with in the Contract Act and the latter question could not have been envisaged by the draftsmen of the Act. Similarly, in the discussion of the question as to how far a minor is bound by contracts entered into by his guardian the decision of a Full Bench of the Madras High Court in A I R 1956 Mad 261 has not been cited or considered though it had adopted a different view from that of the Full Bench of the Andhra High Court in A I R 1956 Andh 33 as to the effect of the P.C. decision in A.I R 1948 P C. 95 on the earlier P C ruling in I L R. 39 Cal 232 Also the citation of the Andhra Full Bench decision should not have been given as (F B) A I R 1956 Andhra but as A I R 1956 Andhra 33 (F B) mentioning the page as well On page 294 appointment of a guardian in a suit for a minor should be stated as made under Order 32 of the Civil Procedure Code and not under Order 31 Apart from the typographical errors specified in the Errata list there are plenty of other such errors present. These remarks notwithstanding, the book under review form a useful addition to the literature on the Indian Contract Act.

THE SALE OF GOODS ACT AND THE PARTNERSHIP ACT by *Pollock* and *Mulla*, 3rd edition by *D N Pritt*, 1966 (Published by N M Tripathi Private Ltd , Bombay), Price Rs 25

The Sale of Goods Act, 1930 which replaced sections 76 to 123 of the Contract Act is based upon and largely follows the English Sale of Goods Act, 1893 The Partnership Act, 1934 which superseded charpter XI of the Contract Act draws inspiration from the corresponding English Act of 1890 A feature of both the Indian Acts is that no illustrations at all have been appended to them Naturally a commentary on these Acts by Sir Frederick Pollock and Sir Dinshaw Mulla commands great respect by reason of their eminence as jurists and their intimate knowledge of the subject The present edition fully maintains the high standard achieved by the earlier editions for crisp and accurate comments English and Indian decisions rendered since the last edition have been considered Lord Denning's observation in (1965) 1 Q B 424 at page 432 " The word ' sale ' properly connotes the transfer of the absolute or general property in a thing for a price in money " —is quoted to elucidate the essential requisites of sale The book will be cordially welcomed by the legal profession

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ACCIDENT CLAIMS JOURNAL, 1966, edited *By N. N Dhawan*, (Published from 12, Malka Ganj, Delhi-7)

The Journal is devoted to reporting decisions pertaining to accidents Due to modern conditions of life traffic perils are on the increase, resulting in a heavy toll of human lives or serious injury to the victims To enable compensation being recovered cheaply and expeditiously by the victims or in case they die by their representatives a number of Acts like the Fatal Accidents Act, the Workmen's Compansation Act, and the Motor Vehicles Act have been passed Claims are made to the Tribunals constituted under the Acts or to the Courts where there are no such Tribunals, and appeals to the Court are also provided. A rich jurisprudence is fast developing in this branch of law The reporting of all decisions on accidents in a Journal exclusively devoted to the purpose is a welcome idea The Journal under review has shown an imaginative approach giving a useful topical index of the reported cases at the commencement, followed by the texts of the decisions of the Supreme Court and the High Courts as well as the texts of

some English and Canadian decisions in accident cases, and ending up with an Articles and Statute section The Journal will prove helpful to those engaged in accident cases and to the members of the public.

AUTOBIOGRAPHY OF SIR C SANKARAN NAIR, (Published by *Lady Madhavan Nair* Lynwood, 52, Kodambakkam High Road, Madras-34), Price Rs 17-50

This is the life-story of an arresting personality in Indian Public life who had held not only the highest governmental offices then open to an Indian but also the position of President, Indian National Congress during a crucial year in its history;- of a man who though born in an orthodox family was always in the forefront of every movement for social reform, of a sturdy partiot and a dauntless fighter in the cause of the country's freedom who despite pinpricks and un-deserved, criticism looked all the time ' onward and upward and true to the line.' The book gives a vivid picture of early social life and economic conditions in Malabar, its superstitions and practices, its racial and caste prejudices etc. The presentation is marked often by a keen sense of humour as in the recounting of the case of the amorous young civilian and his cure or of his father's logic in having his bath in the house itself instead of the customary dip in a tank etc From the book we learn about the tradition that the people of Malabar were at one time Buddhists, that students and college professors moved on cordial and intimate terms, that a convert is more fanatical than the average man, that the civilian started as the protector of the weak and the poor but developed into a reactionary with the awakening of the masses. The landmarks, in the author's career as lawyer, legislator, Judge of the High Court Member of the Viceroy's Executive Council etc. are portrayed with a wealth of detail. Here, in this book, for the first time we are afforded a full picture of the events, forces and conflicting pulls in operation during the period of the Montagu Chelmsford Reforms resulting in the passing of the Government of India Act 1919, and the very considerable and significant contribution made by the author. We also get a lot of information about the great and leading personalities in contemporary public life and the parts played by them In between, we also learn interesting details regarding the partition of Bengal and its aftermath, the Rowlatt Act, the Jallianwalla Bagh firing and subsequent happenings, the litigation in which the author was involved and various other matters.

The memoirs are sure to serve as a key to a proper understanding of Indian affairs during a formative period in its history The book will also be read with profit and inspiration by every young person as a tale of achievements by a man of robust commonsense and sterling independence.

ARTICLE 286 (1) AGAIN.

By

S. VAIDYANATHAN, *Advocate, Madras*

The recent decision of the Supreme Court in **Malayalam Plantations Ltd.** v. **Deputy Commissioner of A.I.T. and Sales Tax**[1] brings out the difficulties that persist in the interpretation and application of Article 286 (1) of the Constitution, in spite of the authoritative judicial pronouncements clarifying several aspects of the problems that arose under the said provision Before dealing with the decision, it will be useful to state the legal position as settled by the decisions of the Supreme Court under Article 286 (1) as it stood prior to the Constitution (Sixth Amendment) Act, 1956 The position was this —Subject to the provisions of clause (2) of Article 286 the State referred to in the **Explanation** to clause (1) of Article 286, hereinafter referred to as delivery-cum-consumption State, was empowered to tax all sales involving inter-State elements But the **Explanation** was only an enabling and not a charging provision Whether the delivery-cum-consumption State can validly levy sales tax will depend upon the existence in the Sales Tax Act of that State, of a provision making a sale falling within the terms of the **Explanation** liable to tax. In the absence of a charging provision in the Sales Tax Act of the said State, such sales are not liable to be taxed Sales which do not fall within the **Explanation**, hereinafter referred to as 'Non-**Explanation** Sales' may be of two types, such as (a) sales where all the ingredients of the sale occur or are present within the territory of a single State This is a simple case of a purely intra-State sale. All sales of this kind are taxable according to the provisions of the Sales Tax Act of the concerned State, (b) Sales where the several ingredients of the sale are spread over two or more States To take an example, there may be a sale where the contract of sale is made in State A, the goods are situate in State B, at the time of the contract, the property in the goods sold passes to the buyer in State C, and the goods are delivered in pursuance of the sale in State D, but **not** for consumption in that State. The answer to the question, whether such a "Non-**Explanation** sale" is liable to be taxed by all or any, and if so, which of the States A, B, C and D, will depend upon the provisions of the Sales Tax Act of the respective States, which fix the situs of the sale for the purpose of the relevant Act. It is conceivable that the Sales Tax Act of State A fixes as the situs of the sale the place where the property in the goods passes, while the place where the contract of sale is made is declared by the Sales Tax Act of State B to be the situs of the sale, and the Act of State C states that the sale shall be deemed to have taken place in that State if the goods are situate therein at the time of the contract sale. In the situation referred to, the transaction of sale is not liable to be taxed by any of the States A, B and C. At the same time, it is equally possible that the same sale may be subjected to taxation by more than one State under the terms of the relevant Sales Tax Acts To mitigate the hardship, likely to be caused to traders by such a possibility as the one indicated above, the makers of the Constitution were careful to enact clause (2) in Article 286 By this provision a second restriction is imposed on the States' power of taxation, the first restriction being that imposed by Article 286 (1) (a) Article 286 (2) states that, subject to future legislation by Parliament, no State shall impose or authorise the imposition of a tax on the sale

1. (1965) 1 S.C J 773 : (1964) 15 S T C. 665 A I R. 1965 S C 161.

or purchase of goods when such sale or purchase takes place, "in the course of inter-State trade and Commerce" But wide as the ambit of inter-State trade and commerce is, the "course of inter-State trade and commerce" is necessarily narrower concept, and is not wide enough to include within it all sales involving inter-State elements Sales with inter-State elements which do not occasion, cause or result in the movement of goods from one State to another are not sales "in the course of inter-State trade and Commerce" within the meaning of clause (2) of Article 286 State taxation of such sales does not fall under the inhibition of the provision Thus it will be seen that in spite of the elaborate care taken by the makers of the Constitution to prevent the possibility of multiple taxation by different States of the transaction of sales, Article 286 (1) (a) with the **Explanation**, and clause (2) of the Article as originally enacted, still left an area outside the operation of the said provisions, where the possibility of multiple taxation is not completely excluded.

The facts of the cases in **A. V. Thomas & Co. Ltd.** v **Dy. Commissioner of A.I.T. and Sales Tax** [2] and **Malayalam Plantations** v **Dy. Commissioner of A.I.T. and Sales Tax** [2-a] reveal that sales involving inter-State elements and falling outside the **Explanation** to clause (1) of Article 286 Article 286 (2) are not uncommon in trade and commerce

In both cases, tea stocked in the warehouses of the sellers in the State of Travancore-Cochin was auctioned in separate lots at Fort Cochin in the State of Madras It was found by the Courts that the property in the goods, passed to the respective buyers at Fort Cochin on the fall of the hammer at the auctions Deliveries were made from the seller's warehouses in Travancore-Cochin The buyers after taking delivery exported the goods to other States in India or to other countries beyond India Admittedly there was no delivery for consumption in Travancore-Cochin No question as to the applicability of Article 286 (2) was raised at any stage Thus on the facts these were cases of typical "**non-Explanation sales**", whereunder the property in the goods passed to the buyers in the State of Madras, while the goods were physically stored in the State of Travancore-Cochin at the time of the auction sales The transactions took place before the enactment of the Constitution (Sixth Amendment) Act, 1956 The (Kerala) General Sales Tax Act (II of 1125 M E), 1950, contained a provision whose importance and significance in the context of the problem posed by these facts does not appear to have been adequately appreciated by the learned Judges of the Supreme Court who decided the two cases in favour of the assessee, reversing the conclusions of the High Court The provision in the Kerala Act, referred to above, was **Explanation** (2) to Section 2 (j) of the Act, which defined the word "Sale" **Explanation** (2), in so far as it was material, ran thus —

"**Explanation** (2) —Notwithstanding anything to the contrary in the Sale of Goods Act for the time being in force, the sale or purchase of goods shall be deemed for the purpose of this Act, to have taken place in the State wherever the contract of sale or purchase might have been made (a) if the goods were actually in the State at the time when the contract of sale or purchase in respect thereof was made, or (b) " The High Court held that **Explanation** (2) to Section 2 (j) of the Sales Tax Act operating in Travancore-Cochin, was not violative of Article 286 (1) (a) of the Constitution and as at the moment the property in the goods passed the goods were in that State, the turnover of the sales was liable to be taxed under the Act, even though the property in the goods passed in the State of Madras Stating that the previous decision of the Supreme

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2. (1964) 1 S C J 373 A I R 1964 S C 569.
2-a. (1965) 1 S C J. 773 (1964) 15 S.T.C. 665 . A I.R. 1965 S.C. 161.

Court in, **Indian Copper Corporation Ltd.** v **State of Bihar**[3] had settled the law that the State (other than a delivery-cum-consumption State) which could tax a "non-**Explanation** Sale" is only the State in which the property in the goods passes, Rajagopala Ayyangar, J , speaking for himself and three of his learned colleagues, held (**Malayalam Plantations** v **Dy. Commissioner of A.I.T. and Sales Tax**)[4] that as the property in the goods did not pass in Travancore-Cochin, that State had no right to levy the tax, notwithstanding the clear terms of **Explanation** (2) to clause (j) of Section 2 of the State Act Implicit in the reasoning and conclusion of the learned Judges, are two propositions —(1) Article 286 (1) (a) read with the **Explanation** to clause (1) has the effect of repealing indirectly **Explanation** (2) to Section 2 (j) of the Kerala Act and analogous provisions in the Sales Tax Acts of other States, which declare that the sale for the purpose of the respective Acts shall be deemed to have taken place in that State if there is a specified nexus other than the passing of the property in the goods, between the taxing State and the transaction of sale The second proposition implicit in the construction adopted by the Supreme Court in the two cases from Travancore-Cochin, is that Article 286 (1) (2) read with the **Explanation** thereto fixes for all the States, the passing of the property as the sole and decisive nexus for determining the situs of the taxable sale

At this stage it may be pertinent to restate in the interest of clarity certain consequences which emerge out of the operation of Article 286 (1) (a) The said provision read with the **Explanation** to clause (1) operated —

(a) to empower the delivery-cum-consumption State to tax sales (involving **ex-hypothesi** inter-State elements) having the attributes specified in the **Explanation.**

(b) to prohibit all States, other than the delivery-cum-consumption State from taxing "**Explanation** Sales'

(c) to leave unimpaired the power of the States to tax all sales as a result of which there is no delivery for consumption in any State The resulting position may be summarised thus — All States except the delivery-cum-consumption State are prohibited from taxing "**Explanation** sales" Subject to the provisions of Articles 286 (1) (b) and 286 (2), all States are free to tax "non-Explanation sales" involving inter-State elements In respect of these "non-Explanation sales' the question as to the situs of a particular sale can only be determined by reference to the provisions, if any, made in that behalf by the relevant Sales Tax enactment applicable to the State On this question, it is submitted one can obtain no guidance from the **Explanation** to Article 286 (1) The function of the **Explanation** is limited

It is statedly "for the purposes of sub-clause (a)" of clause (1) It can have no operation beyond the said purposes It does not **ex-facie** fix the situs of a sale for purposes of taxability under the Sales Tax Acts of the several States Having regard to these features, it is not legitimate, it is submitted, to construe the **Explanation** as repealing by implication provisions similar to **Explanation** (2) to Section 2 (j) of the (Kerala) General Sales Tax Act in the Sales Tax laws of most of the States and as substituting in the place of such provisions, a provision that the sale shall be deemed to have taken place in a State for purposes of taxability and in the Sales Tax Act of that State, if the property in the goods passes in that State It has, however, been said[4]-a that the **non-obstante** clause in the **Explanation** to Article 286 (1) leads to the inference that it is the place where

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3 (1961) 1 S C J 457 (1961) 2 S C R 276 A I R 1961 S C 347

4 (1965) 1 S C J 773 (1964) 15 S T C 665 A I R 1965 S C 161

4-a (1961) 1 S C J 457 (1961) 2 S C R. 276 at 285 A I.R. 1961 S C 347 at 352 Col (1) Per Rajagopala Ayyangar, J.

the property in the goods passes that determines the **locus** of the sale It is respectfully submitted that it is not permissible to spell out of the **non-obstante** clause under reference the inference that the **Explanation** impliedly fixes the place of the sale for taxability under the several State Sales Tax Acts In the first place, the **Explanation** deals only with a particular type of sale, namely a sale as a direct result of which the goods are delivered for consumption in a State Obviously it does not deal with "non-**Explanation** Sales" One cannot therefore press into service any implications arising out of the **non-obstante** clause of the **Explanation** for any guidance as to in what circumstances a "non-**Explanation** sale" shall be deemed to have taken place in a State for the purpose of attracting liability to tax under the Tax Act of that State Secondly, instead of attempting to stretch the operation of the **Explanation** by a somewhat strained construction of the **non-obstante** clause, it is much simpler to read the latter as merely emphasising the idea that the sale described in the **Explanation** shall be deemed to have taken place only in that State where the goods are delivered for consumption and not in any other State, not even in the State where the property in the goods passes under the General Law of the sale of goods It is worth repeating that the specification of the State **in** which the sale shall be deemed to have taken place, affirmatively by the opening and operative clause of the **"Explanation"**, and negatively by the **non-obstante** clause, is only "for the purpose of sub-clause (a)", of clause (1) and not for any other purpose In view of the foregoing considerations it is respectfully submitted that the decisions of the Supreme Court in the two Travancore-Cochin cases may require reconsideration It is interesting to note that Shah, J begins his separate judgment in the case of the **Malayalam Plantations** [4-b] with the statement, that if the question raised in that case was **res integra,** he would have come to a conclusion different from that of his colleagues regarding the taxability of the turnover of the auction sales under the (Kerala) General Sales Tax Act (XI of 1125, M E), 1950 He has made a significant reservation that he is not to be understood as subscribing to the view that the doctrine of territorial nexus which was the basis of most of the legislation on Sales Tax under the Government of India Act, 1935, has been completely abrogated after the enactment of the Constitution It is also significant that in the earlier decision in the case of the **India Copper Corporation Ltd.** [4-c] although the Court was unanimous in rejecting the contention of the assessee a dealer in Bihar that the turnover of its sales under which the goods were delivered in another State, but not for consumption therein, was not liable to be taxed under the Bihar Sales Tax Act, two different grounds were given in support of the conclusion The case was decided on the common ground that the property in the goods passed in Bihar Three learned Judges of the Supreme Court were of the view that after the enactment of the Constitution, that State in which property passes is the only State which has the power to tax the sale On the other hand, the other two learned Judges of the Bench held that as the sales in question did not fall within the Constitutional prohibition, they were taxable under the Bihar Act They expressly state that in adjudging the taxability of a "non-**Explanation** sale", the doctrine of territorial nexus could not be wholly excluded from consideration It may be noted that the Bihar case, like the subsequent two cases from Travancore-Cochin related to 'non-**Explanation** sales", Further S 2 (g) (i) of the Bihar Act fixed the situs of the taxable sale, on substantially the same lines as **Explanation** (2) to Section 2 (j) of the Kerala Act Both the provisions stated that the sale shall be deemed to have taken place in the respective taxing State, if the goods were located within the concerned State at the time of the contract of sale

4-b. (1965) 1 S C J 773 (1964) 15 S T C 665 A I R 1965 S C 161
4-c (1961) 1 S C J 457 (1961) 2 S.C R 276 A I R 1961 S C 347.

But in the Bihar case, all the ingredients of the concerned sales (including the passing of the property), except delivery were in Bihar As the deliveries were made in another State but not for consumption therein, there was no difficulty in holding that the State of Bihar in which the property in the goods passed was not subject to the inhibition of Article 286 (1) (a) and the sales were liable to be taxed under the Bihar Sales Tax Act A distinctive feature of the Travancore-Cochin cases, which was absent in the Bihar case, was that the goods were physically stocked in Travancore-Cochin State at the time of the contract of sale and of the transfer of the property in the goods at the auction in the State of Madras. The sales therefore fell squarely within the terms of **Explanation** (2) to Section 2 (j) of the Kerala Sales Tax Act the material portion of which has been extracted above The infirmity of the decisions in the cases of **A. V. Thomas & Co., Ltd.**,[5] and the **Malayalam Plantations**[6] is, that the decisions proceed on the assumption, for which, it is respectfully submitted, there is no basis either on facts or in law that after the enactment of the Constitution, **Explanation** (2) to Section 2 (j) of the Kerala Sales Tax Act, stood repealed in some unexplained manner

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5 (1964) 1 S C J 373 A I R 1964 S C 569

6. (1965) 1 S C J 773 (1964) 15 S.T C 665 A I R. 1965 S C 161.

LAW'S DELAY.

By

M. VELAYUDHAN NAIR,

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Speaking about LAW'S DELAY at the inauguration of the Centenary celebrations of the Madras High Court, Ramachandra Iyer, C J said —

"With reference to "Law's Delay", which is at least as old as 'Hamlet' and which was rife to an appalling degree in the Court of Chancery itself in Britain as late as Charles Dickens, I think that a comprehensive and just solution of this problem requires the appreciation of several factors, not merely the resort to some mechanical expedient We have to recollect that procedural safeguards, designed to protect the individual, might have a hampering effect upon the disposal of cases and appeals, for that reason they cannot be done away with Equally, the haste which sacrifices quality for volume must be strongly deprecated, for statistics, however gratifying, cannot counter-balance haste, slipshodness or injustice in the individual instance Such measures, as the dispensing with the printing of records in suitable cases, administrative checks of several kinds and the careful review of judicial work at a higher level might accomplish a great deal But all this has to be done with some patience and insight, for true results "

2 Stronger language was used by the learned Chief Justice of the Calcutta High Court regarding the complaint of 'Law's Delay' in his speech on the occasion of the Centenary Celebrations of the Calcutta High Court, when he said —

"It is no doubt true that occasionally ironical utterances are made in some quarters about the tardiness of disposal of cases and the accumulation of work in the High Court But this section of the critics loses sight of the fact that the wig and the gown are hardly a fittting costume for the running of races or the performance of feats of agility and the people look for other qualities in a judicial tribunal than mere plenty of go What people look for in a judicial tribunal is a sublime and elevated sense of justice, a detached and dispassionate frame of mind, a patient hearing, absence of ebullition and an irritable and unrestrained temper, cool and calculated thinking and a satisfactory solution of their problems The exacting standard can only be achieved where the elements of haste and haphazardness are absent. The quality of justice cannot be sacrificed at the altar of rapidity of its dispensation "

3. As is often said, it is not enough if justice is done, justice must seem to be done If a case is disposed of hastily, the party who loses will surely attribute his ill-luck to the hasty and haphazard manner in which the case was tried

4 It is often said that justice delayed is justice denied It is equally true to say that justice hurried is justice buried.

5. Refusal to grant adjournment in cases even though there are valid grounds for granting adjournment will surely and inevitably cause needless heart-burning and distress to the parties as well as to their Counsel In a majority of cases where adjournment is refused, even though there are valid grounds for adjournment, the Counsel is obliged to report 'no instructions' and the suits are either dismissed for default or decreed **ex parte.**

6. Some judges are not able to resist the temptation to take short-cuts for speedy disposal of cases Referring to this temptation, Mr Megarry, Q C , says in his Hamlyn Lectures on "Lawyers and Litigants in England",—

"The heavier the lists, the greater the pressure on judicial time, the stronger the temptation Remove the pressure, and even fewer judges would yield In the end, almost the whole of the answer lies in having enough judges and in ceasing to treat every available minute of judicial time as if it were spun of gold . . . From the litigants' point of view, a judicial short-cut is often extremely wasteful. The litigant has assembled the whole apparatus of litigation, Counsel, Solicitors and witnesses are all there and the chance of having the point decided will never occur again With all this initial expenditure of time and energy, why begrudge the extra hour or two needed to wipe the slate clean? Would not a refusal to do so be as wasteful as the refusal of fellow travellers to make a detour of a few miles to see some splendid view or beautiful Cathedral, when they have journeyed thousands of miles to the country and are unlikely ever to return? Is it not worth an extra hour or two to prevent a litigant harbouring a grievance against law and lawyers for the rest of his life? There must of course be limits and there are times when attempts to drag in side issues are beyond reason But when in doubt, include" (Pages 159 and 160).

7. Judges must have time to study the papers as well as the decisions cited at the bar by Learned Counsel—and to assimilate them so that they may satisfy their judicial conscience before they pronounce judgment. Judges who are obliged to dispose of cases hastily and who pronounce judgments in haste will often have cause to regret.

8. Years ago, Lord Chancellor Eldon wrote:—

"During my Chancellorship, I was much, very much blamed for not giving judgment at the close of the arguments I persevered in this, as some thought, from obstinacy, but in truth from principle, from adherence to a rule of conduct formed after much consideration what course of proceeding was most consonant with my duty With Lord Bacon, I confess I have somewhat of the cunctative and with him I thought that "whoever is not wiser upon advice than upon the sudden, the same man is no wiser at fifty than he was at thirty " "I confess that no man had more occasion than I had to use the expression which was Lord Bacon's father's ordinary word "You must give me time" I always thought it better to doubt before I decided, than to expose myself to the misery, after I had decided, of doubting whether I had decided rightly and justly It is true that too much delay, before decision is a great evil—but in many instances, delay leads eventually to prevent delay—that is the delay which enables the just decision to be made, accelerates the just enjoyment of the fruits of the suit—and I have some reason to hope that in a great many cases final decision would have been infinitely longer postponed, if doubts as to the soundness of original judgments had led to re-hearings and appeals, than if it was postponed when infinite care, by much and anxious consideration and long consideration, was taken to form an impregnable original decree. The business of the Court was also so much increased in some periods of my Chancellorship, that I never could be confident that Counsel had fully informed me of the facts or of the law of many of the cases And there may be found not a few instances, in which most satisfactory judgments were pronounced, which were founded upon facts or instruments with which none of the Counsel who argued the case were acquainted, though such facts and instruments formed part of the evidence in the cause . There is a beautiful passage in the works of an eminent French Chancellor Daguessean, in which observing that his son told him that he delayed judgments too long, he states the infinite importance of considering again and again every case, till you are sure that the minutest circumstances does not escape attention and that the want of due regard to such a circumstance may work the greatest possible injustice. The passage is a very beautiful and striking one and ought to be a weighty momento to every judge in equity, in which most cases

that are cases of any difficulty, are as to facts, extremely complicated." (Lord Eldon's Anecdote Book—Pages 130 to 133).

9. The following passage about 'Law's Delay' from Mr. Megarry's "Miscellany at Law" may be read with interest.—

"The law's delays are proverbial, perhaps inevitable and yet not always explicable. Bacon, V C once said "This case bristles with simplicity. The facts are admitted, the law is plain and yet it has taken seven days to try—one day longer than God Almighty required to make the world." (page 244). "For the delays that do occur today, the Bench, Jury, Bar, Solicitors, witnesses and the law itself must all at times bear some measure of responsibility Brevity was never a conspicuous bed-fellow of legal draftsmanship and sometimes the draftsman travelled outside the bounds of the permissible. Thus in one case where the defendant "pleaded a sham plea of judgments recovered in the Court of piepoudre in Bartholomew Fair", the Court "expressed great indignation against the abuse which had grown up of late and was continuously increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature making them the vehicles of indecorous jesting." (Page 246)

COURT-FEES ACT—CHANGES NEEDED.

By

C. S VENKATASUBRAMANIAN, *Advocate, Coimbatore.*

The recent decision of the High Court in the Court-fee writ petitions provides an excellent opportunity to the State Government to rationalise the levy of Court-fees in the State and lessen its rigour on the litigant public The Law Commission, observing that India was one of the few countries which levied a heavy Court-fee in civil Courts, strongly protested against the system of such a levy in order to meet the expenses of maintaining the Criminal Courts of the country. It observed that the administration of Criminal justice must be a charge on the general revenues of the State and the civil litigant must not be taxed for that purpose. Indeed one is tempted to say that if the Court-fees levied in the civil Courts are utilised entirely for the maintenance of civil Courts and appointment of more judges is made from out of these revenues, the cry of huge arrears in the civil Courts will be a thing of the past.

It is true that the learned Judges of the High Court only struck down Art. 1, Schedule I imposing a uniform levy of 7½% **ad valorem** (without a ceiling) as being an oppressive tax and not a mere fee for services. But there are several other provisions which require to be amended in the light of experience and some of them are discussed in this article.

Ad valorem fees.—Taking the impugned levy itself, it will be remembered that under the original Court-fees Act of 1870, the corresponding **ad valorem** levy was based on a slab system, with a prescribed maximum of Rs 3,000 (incidentally it is interesting to note how the legislatures of those far off days foresaw and respected modern constitutional distinctions between fee and tax). Significantly enough Madras was one of the first provinces to increase the various slab rates and to remove the maximum limit by the amending Act of 1922. Having regard to the current value of the rupee, it looks to the present writer that a uniform rate of 6% subject to a maximum limit of Rs 5,000 will be an equitable scale of Court-fee.

Suits in respect of land.—Section 7 of the Madras Act provides that in respect of suits for injunction or possession (and certain other classes of suits) in respect of land, the market value of the property shall be taken to be a fixed multiple of the

land revenue, Melwaram, Peishkush, etc., payable for the land and not the actual market value thereof. The object of this provision is certainly a laudable one intended to provide a cheap remedy for poor agriculturists who may require the assistance of the Courts to establish their rights. But a combined operation of this section and section 53 which prescribes the value of the suit in such cases for purposes of determining the jurisdiction of Courts shall also be the same notional value and not the actual market value leads to repercussions which completely frustrate the abovesaid object. For, the fixation of such a notional value enables suits for recovery of possession of immovable property worth even Rs. 50,000 or more being filed in the Court of the Munsif whose pecuniary jurisdiction is restricted to suits of a value of Rs. 5,000 and less. When superficially looked at, this might look entirely innocuous. But it will be clear that such a provision far from providing a quick and cheap remedy, results in a three-way disadvantage.

First, the said provision entirely frustrates the wholesome object underlying the Civil Courts Act which reserves suits involving higher stakes to be tried by experienced Subordinate Judges. For indeed it is anomalous that a Munsif who will have no jurisdiction to try a suit on a promissory note for Rs. 5,001 will nevertheless have jurisdiction over a title suit (involving perhaps complicated questions of fact and law) in respect of agricultural land worth tens of thousands of rupees. (It is also noteworthy that such a suit regarding a house can only be filed in a Sub Court). The poor agriculturist is therefore not considered worthy of having a trial before an experienced Subordinate Judge.

Secondly, the institution of the suit in the Court of the Munsif may mean that the poor agriculturist may be dragged from pillar to post by an unworthy opponent (and in our country anyone who opposes the cause, whether right or wrong, of an agriculturist has got to be an unworthy individual) by a first appeal to the District Court, a second appeal before a Single Judge of the High Court and a Letters Patent Appeal to a Division Bench (assuming that the matter does not go higher up). Whereas if the suit had been instituted in a Sub-Court as it would have been if the value of the suit for jurisdiction had been prescribed as the actual market value and not the absurd notional value even a first appeal would have been heard by a Division Bench of the High Court and that would have been an end of the matter and the successful party would have spent a lesser number of years of his life in Courts.

Lastly, it is not perhaps realised that the adoption of a notional value as to jurisdiction results in the successful party not getting by way of taxed costs anywhere near what he would have spent in the litigation, by way of lawyer's fees, etc., for, taxed costs are allowed only on this notional value and it is idle to imagine that

any lawyer would accept a fee calculated on this ridiculous notional value. And if the learned Judge should say that each party is to bear his own costs without assigning any reason for not granting the costs of the successful party (as appears to have become a frequent and unfortunate practice nowadays) the aphorism "The party who wins in a litigation really loses" becomes literally true. It is imperative therefore that section 5 and section 53 must be suitably amended by adding a proviso that the value of a suit for purposes of jurisdiction in cases governed by section 7 shall however be the actual market value as in the case of houses

Court-fee in appeal.—Under section 52 the present rate of Court-fee payable on a memorandum of appeal is the same as the fee payable in the Court of the first instance on the subject-matter of appeal Having regard to the nature of the proceedings in appellate Courts, it appears that a fee of more than one half of the Court-fee paid in the trial Court is not entirely justified This requires amendment. Again while under section 69 a refund of Court-fee paid on the plaint is allowable if the suit is settled out of Court before the trial the said provision does not apply to appeals. There is no reason why when an appellant settles his dispute out of Court he should not similarly be entitled to a refund of the Court-fee paid in the memorandum of appeal.

Court-fee on Succession certificates, etc.—Finally a word about the levy of Court-fee on succession certificates, probates and letters of administration It looks to the present writer to be an absolutely unjustifiable levy. For while the levy of a Court-fee **on an application** for issue of a succession certificate, etc, is perfectly valid, the same cannot be said of the levy **on the certificate** which really partakes of the character of an estate duty. Smaller estates which fall below the taxable limit under the Estate Duty Act but which require payment of a Court-fee on the representation do not enjoy the benefit of exemption whereas bigger estates are entitled under section 50, Estate Duty Act, to a rebate of estate duty payable to the extent of the Court-fee paid on the representation Whatever may have been the justification for the original levy of a Court-fee on Succession Certificates, probates and letters of administration before the passing of the Estate Duty Act, 1953, there is no justification whatsoever for the continuance of the said levy. Incidentally the increase by the Madras Act of the rates prescribed by the Central Act of 1870 would also appear to be **ultra vires** by the same token since the subject of duties on succession is a central subject When it is remembered that costs of proceedings for issue of a succession certificate etc, in **ex parte** cases is not recoverable, the plight of a poor heir can be imagined especially if the creditor should unreasonably insist on production of a succession certificate

Conclusion.—In the view of present writer, the Madras Court-fees Act, 1955, requires, **inter alia,** the following changes and it is hoped that the State

Government will give its earnest consideration to this matter taking into account the justice of cause and not merely the revenue point of view —

(a) Repeal of the present Article 1, Schedule I, and introduction of a uniform rate of 6% subject to a maximum of Rupees Five Thousand;

(b) Amendment of section 7 and section 53 by introduction of a proviso that the value for purpose of determining jurisdiction of Courts shall however be the actual market value;

(c) Amendment of sections 52 and 69 reducing the Court-fee now payable in appeals by half and providing for a refund of half the Court-fee on memorandum of appeal and cross objections when appeals are settled out of Court before hearing; and

(d) Repeal of the entire provisions relating to Court-fee on succession certificates, probates and Letters of administration.

A JUDGE PASSES AWAY.

The news of the passing away of Justice Kunhamed Kutti on 3rd June at his village Ponnani will be received with sincere regret by the members of the Bench and the Bar alike as well as by all those who had come into contact with him Born in December 1905, he was due to retire at the end of this year. But the Fates had willed otherwise and he has not lived to enjoy his retirement Having practised at the Bar for some years and served in the Chambers of the late Mr Nugent Grant, Mr. Kunhamed Kutti accepted the post of a District Munsiff in 1939 and a decade thereafter became a Subordinate Judge In the middle of 1956, he was promoted as a District Judge which post he held till he was appointed Judge of the High Court from 7th December, 1960 Throughout his judicial career Mr. Kunhamed Kutti had the reputation of being a patient, considerate and courteous Judge. He was particularly at home in criminal law. He was conscious of the fact that the administration of justice has a social function and that the judicial process is only a part of the larger social process. He was fully alive to the dangers of hard constructions and strained inferences and was aware that there is no worse torture than the torture of the law. His approach to questions of criminal law and procedure and questions under enactments like the Food Adulteration Act reveal such outlook. His judgments are marked by thoroughness in appreciating the facts bearing on the law. He shunned the limelight of publicity and took no particular interest in the publication of his judgments. He was a pious Muslim and was connected with the Malabar Muslims Association. Though he did not come to the Bench straight from the Bar his outlook was not narrow He was warm-hearted and humane in his approach and conscientious in the discharge of his duties May his soul rest in peace.

APPOINTMENT OF THE JUDICIARY.

By

A. S. KUPPUSWAMI, *Advocate.*

Our Constitution directs in Article 124 (2), that " every Judge of the Supreme Court shall be appointed by the President". Similarly, Article 217 (1) directs that " every Judge of the High Court shall be appointed by the President"

Is this power of the President, subject to the constitutional requirement under Article 74 (1) that the President should act on the advice of the Union Council of Ministers and carry it out or, is the power of appointment of the Judges vested in the President in his own personal capacity? The question raises a vital constitutional issue.

Article 74 (1), enacts that " there shall be a Council of Ministers, with the Prime Minister at the head to aid and advice the President in the exercise of his functions". The Article has to be read with Articles 53 (1) and 75 (3) Article 53 (1) enacts that " the Executive Power of the Union shall be vested in the President" Article 75 (3) enacts that " the Council of Ministers shall be collectively responsible to the House of the People". The House of the People consists, in the main, of the elected representatives of the people as per Article 81 Reading the above Articles together, it is clear that the Council of Ministers which is responsible to the elected representatives of the people in the Legislature, is the real custodian of the Executive Power of the Union and that the President is only the representative symbol of this Executive Power. This is the real constitutional status of the President, in reference to the Executive Power of the Union.

This raises the further question as to whether the appointment of the judiciary is, constitutionally, a proper and legitimate function of the Union Executive, so as to attract the binding character of the advice of the Council of Ministers on the President, under Article 74 (1)

My answer is a clear and emphatic 'No'. If the President was constitutionally bound to act on the advice of the Union Council of Ministers in regard to the appointment of the Judges, the result will be that the Council of Ministers will be the real appointing authority of the Judges. This is a direct negation of the root-principle of Justice and the Rule of Law which underline our Constitution. " An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislature with the exercise of the judicial function." (Report of the International Council of Jurists, New Delhi, 1959) In the words of Sri Y. V Dixit, Retired Judge, Bombay High Court " to sustain parliamentary democracy, the presence of a strong, fearless and independent judiciary is essential ". The vital principle of the independence of the judiciary is recognised in our Constitution Article 50 directs that "the State shall take steps, to secure the separation of the Judiciary from the Executive." Thus, it is clear that the President is free to act on his individual judgment on the appointment of the Judges of the Supreme Court and the High Court under Articles 124 (2) and 217 (1) and that he is not bound to act on the advice of the Council of Ministers

in the matter under Article 74 (1). The President will of course consult the Council of Ministers.

The powers of the Governor in relation to the subordinate judiciary under Articles 233 and 234 of the Constitution are exactly parallel to the above powers of the President. The Governor is free to act on his individual judgment in the matter and is not bound to act on the advice of the Council of Ministers in reference to the same under Article 163 (1) of the Constitution.

A STUDY OF THE PROVISIONS OF ORDER 21, RULES 84 TO 86 OF THE CIVIL PROCEDURE CODE.

By

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The interpretation of the provisions of Order 21, Rules 84 to 86 had been the subject of discussion in several judicial decisions of High Courts of India The interpretation and its application often arises in Courts especially in the mofussil. In this article I would like to discuss briefly the scope and effect of the said provisions.

The provisions relating to sales of immovable properties and the delivery of the possession are dealt with under the provisions of Order 21, Rules 82 to 96 of the Civil Procedure Code.

Before I enter into a discussion it will be convenient to extract the relevant provisions

Order 21, *Rule* 84.—(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under Rule 72, the Court may dispense with the requirements of this rule.

Rule 85 —The full amount of the purchase money payable shall be paid by the purchaser into Court before the Court closes on the 15th day from the sale of the property, provided that in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.

Rule 85, has been amended by the Madras and Andhra Pradesh High Courts as follows .—

The full amount of purchase money payable and *general stamp for certificate under Rule* 84 *or the amount required for such stamp shall be deposited* into Court by the purchaser before the Court closes on the fifteenth day from the sale of the property:

Provided that in calculating the amount of purchase money to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72

Order 21, *Rule* 86 —In default of the payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of sale be forfeited to the Government and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

Thus it is found that under the provisions of Rule 84, soon after the property sold is knocked down the purchaser shall deposit 25 per cent on the amount of his purchase money to the officer or person conducting the sale failing which the property will be resold. This rule is governed by a proviso to the effect that if he is a decree-holder and is entitled to set-off the purchase money under Rule 72, the Court may dispense with the requirements of the rule. In enacting the said proviso, it would appear, that the Legislature, kept in view the distinction between a stranger auction-

purchaser and decree-holder-purchaser It would thus be seen that Rule 85 was considered to be mandatory so far as the decree-holder-purchaser is cocerned.

Under Rule 85, it is enacted that the full amount of purchase money indicated in Rule 84 shall be paid before the Court closes on the 15th day from the date of sale Provided that in calculating the amount so paid, the purchaser shall have the advantage of any set-off under Rule 72 Subsequently the Madras and Andhra High Courts have introduced amendments to Rule 85 By virtue of the said amendments, it is provided that the auction-purchaser has to deposit the full amount of purchase money and the general stamp required for the certificate under Rule 94 or the amount for such stamp before the Court closes on the fifteenth day from the date of sale. The proviso as contained in Rule 85 of Civil Procedure Code has not undergone. any change The amendment enacted also continues to be subject to the proviso.

Rule 86 enacts the consequence that flows in case of failure to comply with Rules 84 and 85. It states that in the event of failure to comply with Rules 84 and 85, the Court may forfeit the deposit after defraying the expenses of sale, and the property will be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be resold.

Thus the provisions of Rules 84 to 86 are so interlinked that one has to be read in conjunction with other

It would thus appear that under Rule 85, the absence of deposit of purchase money and the payment of general stamp are mandatory in the case of stranger auction-purchasers the default of either of them would entail the entire sale being declared invalid, etc In the case of decree-holder-purchaser any *bona fide* defect or default by him could be condoned, provided that he had complied with other formalities such as laid down in Order 21, Rule 84 (2) and Rule 72

In this connection I may refer to some of the decided cases on this question.

In *M. M Shaw* v *Sayed Ahmed*[1], after considering the entire case-law, it has been observed by their Lordships as follows :—

"The provision regarding the deposit of 25 per cent by the purchaser other than the decree-holder is mandatory as the language of the Rules suggests."

In *M Suryanarayanamurthi* v *Southern Agencies*[2], his Lordship Justice Sanjeeva Rao Naidu observed at page 140 as follows :—

" Mr. Sambasiva Rao, the learned Counsel for the respondent invited my attention to the decision of the Madras High Court in *Venkataramaiah* v. *Adinarayanaiah*[3]. In that case the decree-holder-purchaser failed to deposit within time into Court the stamp or the amount required for stamp for the sale certificate under Order 21, Rule 85 and their Lordships Rajamannar, C J., and Venkatarama Iyer, J., held that the failure could not result in the automatic cancellation of the sale under Order 21, Rule 86, Civil Procedure Code."

His Lordship further observed at page 141, "I respectfully follow the conclusions reached by their Lordships in that case and hold that the omission of the auction-purchaser in not depositing the correct amount representing the general stamp in this case cannot have any effect whatsoever on the validity of the sale held, once the

1. (1954) S C.J 509 . (1954) 2 M L J 55 (58): (1955) 1 S C.R 108 · A I R 1954 S C 349
2. (1961) A L.T 138 ; A I.R. 1961 A P. 480.
3. (1953) 2 M L.J. 177 : A I.R. 1953 Mad. 929.

condition required by Order 21, Rule 85 namely the deposit of sale consideration in its entirety within the time allowed has been complied with "

In *M Suryanarayanamurthi* v *Southern Agencies*[1], appeal against the decision of Sanjeeva Rao Naidu, J, in *M Suryanarayanamurthi* v. *Southern Agencies*[2] Their Lord ships of the Andhra High Court held that though the deposit of 25 per cent. of purchase money and the payment of general stamp within 15 days from the date of sale are mandatory in the case of stranger auction-purchaser, yet in the case of decree holder-purchaser the Court has every discretion to extend the time At page 272, Para 3 while dealing with Order 21, Rule 85 and its proviso their Lordships obesrved as follows :—

" The proviso has no application to the present case as the purchaser is not a decree-holder and has not the advantage of a set-off under Rule 72 "

In a later decision *Pundarikaksha Rao* v *Venkata Reddy*[3], his Lordship Chandrasekhara Sastry, J, held that if the decree-holder-purchaser had obtained the leave of the Court for permission to bid under Rule 72 and leave of the Court to dispense with the deposit under Rule 84 (2) on an application filed by him at the time of or before the sale the Rule 85 cannot be held to be mandatory.

A similar view has been expressed in *Smt. Bhannari Devi & others* v. *Sohan Lal*[4]. In *Uttamchand Milag Chand* v *Balakrishna Ramanath*[5], their Lordships considered the case of a stranger auction-purchaser and following the principle laid down in *M M Shah* v *Sayed Ahmed Sayed Mahmud*[6], held that the provisions of Order 21, Rule 85 are mandatory

A reading of the above decisions shows that so far as the view of the Andhra High Court is concerned Order 21, Rule 85 after amendment cannot be said to be mandatory in the case of decree-holder-purchaser who has obtained the permission of Court to bid under Rule 72 and the specific leave of Court under Order 21, Rule 84 (2) for dispensing with the deposit of 1/4th purchase money As there is no change in the proviso to Rule 85, the same principle also holds good and also applies to the case of failure to deposit general stamps required within the time prescribed. The object of the Legislature in keeping the proviso to Rule 85 intact is quite clear, *viz*, a decree-holder who brings the properties to sale after resorting to several steps in execution should not be made to suffer for a small technical reason. It quite often happens that the full amount of purchase money or the full general stamp might not be deposited due to *bona fide* error in calculation, etc Hence it is that the decree-holder-purchaser is placed on a different footing than a stranger auction-purchaser. Notwithstanding the above distinction, which could be culled out only from the several decided cases referred to above it would be better that the provisions are suitably amended or fresh provisions are enacted so that there may not be any scope for ambiguity in the interpretation of the said provisions.

[END OF VOLUME (1967) 1 M.L.J. (JOURNAL)].

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1. A.I.R. 1962 A.P. 271
2. (1961) A.L.T. 138 : A.I.R. 1961 A.P. 480.
3. (1964) 2 An.W.R. 430 : A.I.R. 1966 A.P. 201.
4. A.I.R. 1965 Raj 79
5. A.I.R. 1961 Bom 224
6. (1954) S.C.J. 509 : (1955) 1 S.C.R. 108 : (1954) 2 M.L.J. (S.C.) 55 : A.I.R. 1954 S.C. 349.